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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TERESA HOBBINS; KENNETH A. SHAPIRO; WILLIAM DRAKE, Pharm. D.; and ELLIOT D. LUBY, M.D.,

Petitioners,

—v.—

ATTORNEY GENERAL OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

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QUESTION PRESENTED

Whether a state may, consistent with the Fourteenth Amendment's Due Process Clause, absolutely prohibit competent terminally ill persons from making the choice, during the end stages of their terminal illness, to hasten inevitable death by the use of physician-prescribed medications?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. The Nature of the Plaintiffs' Constitutional Claim 2

B. The Proceedings Below 3

C. The Decision of the Michigan Supreme Court 5

REASONS FOR GRANTING THE WRIT 6

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT. . . . 6

CONCLUSION 13

TABLE OF AUTHORITIES

Cases ***Page***

Addington v. Texas, 441 U.S. 418 (1979) 8

Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994) 12

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) 10,11

Heller v. Doe, 113 U.S. 2637 (1993) 8

Hobbins v. Attorney General of Michigan, 205 Mich. App. 194, 518 N.W. 2d 487 (1994) 1

Lee v. Oregon, U.S. Dist. Ct., OR, 12/27/94, No. 94-6167-HO 12

Planned Parenthood of Pennsylvania v. Casey, 505 U.S. __, 112 S. Ct. 2791 (1992) 9,10

Quill v. Koppel, U.S.Dist.Ct., S.D.N.Y., 12/15/94, 1994 U.S.Dist.LEXIS 17965 12

Roe v. Wade, 410 U.S. 113 (1973) 6,8,9

Washington v. Harper, 494 U.S. 210 (1990) 10

United States Constitution

Fourteenth Amendment . . . . . *passim*

Statutes

28 U.S.C. §1257(a) 2

Mich. Comp. Laws 750.505 5

Mich. Comp. Laws 752.1027 3,7

Federal Regulations

42 C.F.R. §418.22 7

Other Authorities

The Sloane-Dorland Annotated Medical-Legal Dictionary (1987) 6

Sup. Ct. R. 10.1(c) 12

No. 94-

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SUPREME COURT OF THE UNITED STATES

October Term, 1994

TERESA HOBBINS; KENNETH A. SHAPIRO; WILLIAM DRAKE, Pharm. D.; and ELLIOT D. LUBY, M.D.,

Petitioners,

-v.-

ATTORNEY GENERAL OF MICHIGAN,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

Teresa Hobbins, Kenneth A. Shapiro, William Drake, and Elliot D. Luby respectfully petition for a writ of *certiorari* to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court has not yet been officially reported, and is set out in the Appendix to this Petition as pp. 1a-107a. The Opinion of the Michigan Court of Appeals has been officially reported at 205 Mich. App. 194, 518 N.W. 2d 487 (1994), and is set out

in the Appendix to this Petition as pp. 108a-140a. The Amended Opinion of the Wayne Circuit Court has not been officially reported and is set out in the Appendix to this Petition as pp. 141a-159a.

STATEMENT OF JURISDICTION

The judgment of the Michigan Supreme Court in this case was rendered on December 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Fourteenth Amendment's Due Process Clause, which provides in part: "[n]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The Nature of the Plaintiffs' Constitutional Claim

Plaintiffs Teresa Hobbins and Kenneth Shapiro are terminally ill cancer patients. When they reach the end stages of their terminal illness, they want to have the choice to end their pain and suffering and to hasten inevitable death by the use of physician-prescribed medications. They also wish to be able to have the assistance of family members or friends in consuming those medications should this become necessary. In the State of Michigan, "assistance to suicide" is a criminal offense. It is undisputed that the crime of "assistance to suicide" precludes physicians and others from giving any assistance whatsoever to competent terminally ill patients in

implementing their decision to hasten inevitable death. Specifically, the crime of "assistance to suicide" prohibits a physician from providing a terminally ill person with opiates, barbiturates and other lethal medications in sufficient quantities so that the terminally ill person could, in the end stages of the terminal illness, make the choice to hasten inevitable death by consuming a lethal quantity of those medications.

B. The Proceedings Below

On March 1, 1993, plaintiffs Hobbins and Shapiro, joined by a number of health care professionals,[1] brought suit in the Circuit Court of Wayne County, Michigan, against the Michigan Attorney General, seeking a declaration that Michigan's recently enacted "assistance to suicide" statute, Mich. Comp. Laws 752.1027, was unconstitutional, and further seeking an injunction against its enforcement. They alleged that the statute was improperly enacted under the Michigan Constitution, and further alleged that the absolute ban on "assistance to suicide" violated the Fourteenth Amendment's Due Process Clause. The Circuit Court found that the statute was improperly enacted under the Michigan Constitution, and further found that the plaintiffs had shown a substantial likelihood of prevailing on the merits of their Due Process

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[1]The Circuit Court found that two of these health care professionals, plaintiff Drake, a pharmacist, and plaintiff Luby, a psychiatrist, had standing to challenge the statute, but that the other health care professional plaintiffs did not. Although those plaintiffs appealed the Circuit Court's decision on the standing question to the Michigan Court of Appeals, that issue was not decided by the Court of Appeals, and it was not involved in the proceedings before the Michigan Supreme Court. For this reason, only plaintiffs Drake and Luby have joined plaintiffs Hobbins and Shapiro in filing this Petition for *Certiorari*.

claim. The Circuit Court granted summary disposition and struck down the statute. The Attorney General filed an appeal to the Michigan Court of Appeals.

In the proceedings before the Michigan Court of Appeals, the present case was joined with appeals involving three criminal prosecutions that had been brought against a Michigan physician, Dr. Jack Kevorkian. Two of these prosecutions were for a violation of the "assisted suicide" statute, and one was a murder prosecution for assisting in a suicide prior to the enactment of the statute. In a 2-1 decision, the Michigan Court of Appeals agreed with the Wayne Circuit Court that the "assisted suicide" statute was improperly enacted under the Michigan Constitution and affirmed the judgment of the Wayne Circuit Court in that respect. On that basis it also held that Dr. Kevorkian could not be prosecuted for a violation of the "assisted suicide" statute. Lining up differently, the panel of the Michigan Court of Appeals then held in a 2-1 decision that the "assisted suicide" statute did not violate the Fourteenth Amendment's Due Process clause, and reversed the judgment of the Wayne Circuit Court to that effect. Finally, the Court of Appeals held in a 2-1 decision, that "assisted suicide" could be prosecuted as murder under Michigan law.

The present plaintiffs and the Attorney General both filed applications for leave to appeal to the Michigan Supreme Court. Applications for leave to appeal were also filed by all the parties in the Kevorkian prosecutions. Leave to appeal was granted to all of the parties, and the cases were argued in tandem on October 4, 1994.

C. The Decision of the Michigan Supreme Court

On December 13, 1994, the Michigan Supreme Court rendered its decision. It first held that the statute had been properly enacted under the Michigan Constitution and in that respect reversed the judgment of the Court of Appeals, which had held to the contrary.[2] It also held that there was no constitutional right to "assisted suicide" under the Fourteenth Amendment's Due Process Clause, and in that respect affirmed the judgment of the Court of Appeals.[3] Finally, it held that in some circumstances, "assisting a suicide" could be prosecuted as murder, but that in any event, "assisting a suicide" could be prosecuted in Michigan as a separate common law felony, under the savings clause of Mich. Comp. Laws 750.505.[4]

As a result of the Michigan Supreme Court's decision in the present case and in the companion cases involving the criminal prosecutions against Dr. Kevorkian, "assistance to suicide" is a criminal offense in Michigan,[5] and the

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[2]All seven Justices of the Michigan Supreme Court concurred in this holding.

[3]Justices Levin and Mallett dissented from this holding in separate opinions, in which each other joined.

[4]Justices Boyle and Riley dissented from this holding, but it was concurred in by Justices Levin and Mallett. Under Mich. Comp. Laws 750.505, an offense that is indictable at common law and that is not otherwise punishable by statute remains a felony, punishable by up to 5 years imprisonment.

[5]There is some question as to whether the "assistance to suicide" statute expired by its own force, but that question is of no moment as regards the plaintiffs' constitutional claim, since "assistance to suicide" has now been declared by the Michigan Supreme Court to be a common law

plaintiffs' claim of a constitutional right to make the choice to hasten inevitable death by the use of physician-prescribed medications during the end stages of their terminal illness has been rejected by the Michigan Supreme Court. The plaintiffs seek a writ of *certiorari* from this Court to review the judgment of the Michigan Supreme Court rejecting their federal constitutional claim.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

In American society today, terminally ill persons are asserting the right to control their own destiny and to make the choice, in the end stages of their terminal illness[6], to

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felony. A physician who furnished the plaintiffs with a lethal supply of medications that they could use to make the choice to hasten inevitable death during the end stages of their terminal illness could be prosecuted for the common law offense and would face five years' imprisonment. There can be no question, therefore, as to the plaintiffs' continuing standing to assert their federal constitutional claim. *Roe v. Wade*, 410 U.S. 113 (1973).

[6]A "terminal" condition means "an incurable physical state caused by injury, disease, or illness which, regardless of the application of 'life sustaining procedures,' would produce death within a reasonable degree of medical probability, and where the application of life sustaining procedures serves only or primarily to postpone the moment of the patient's medico-legal death." *The Sloane-Dorland Annotated Medical-Legal Dictionary (1987)*, p. 711 (citation omitted)

The generally accepted meaning of "terminal illness" is a life expectancy of 6 months or less. For example, Medicare regulations governing eligibility for hospice care require a certification that "specif[ies] that the individual's prognosis is for a life expectancy of 6

hasten inevitable death rather than to continue to undergo unbearable pain and suffering. They seek the autonomy to choose the timing of their death and to bring their suffering to a merciful end. Physicians who treat terminally ill persons have come to recognize the rights of their patients to make the choice to hasten inevitable death, and in appropriate cases, wish to provide the means to enable them to do so. Specifically, in the present case they wish to provide their terminally ill patients with opiates, barbiturates and other medications in sufficient quantities that the patients may, *if they choose to do so*, hasten their inevitable death by consuming a lethal quantity of those medications. Under the law of Michigan and many other states,[7] physicians who supply lethal medications to their terminally ill patients for this purpose are subject to criminal punishment because they are considered to have "assisted a suicide."

Although laws against "assisted suicide" have long been in effect in many states, these laws have rarely been enforced. The original purpose of these laws was to prevent "assisting a suicide" in the ordinary sense of the term, *i.e.*, assisting a person in ending a life that was otherwise of indefinite duration, such as by helping a person jump off a bridge or providing a person with a gun to turn on himself.[8] These laws against "assisted suicide,"

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months or less if the terminal illness runs its normal course." 42 C.F.R. §418.22.

[7]The Michigan Supreme Court identified 30 other states and Puerto Rico and the Virgin Islands that by statute make "assistance to suicide" a criminal offense. (Appendix at pp. 39a-40a, n.51)

[8]This case does not challenge the Michigan law as it prohibits "assistance to suicide" in the ordinary sense of the term. Plaintiffs are unaware of any cases which suggest the state cannot lawfully prohibit a

however, are by their express terms also applicable to a physician assisting terminally ill persons in implementing their choice to hasten inevitable death by the use of physician-prescribed medications. And Michigan, which did not have a statute prohibiting "assisted suicide" prior to 1992, enacted such a statute for the specific purpose of prohibiting "physician-assisted suicide."

The plaintiffs in this case focus on that aspect of the Michigan law which prohibits competent, terminally ill persons from receiving the assistance of their physicians to hasten inevitable death. The constitutionally impermissible effect of laws which absolutely prohibit "assisted suicide" is to prevent physicians from assisting their terminally ill patients in implementing the patients' choice, in the end stages of their terminal illness, to hasten inevitable death by the use of physician-prescribed medications. It is for this reason that the terminally ill plaintiffs in the present case, and terminally ill plaintiffs in other cases, have brought constitutional challenges to legal prohibitions against "assisted suicide."

The terminally ill plaintiffs' constitutional challenge to legal prohibitions against "assisted suicide" is well-grounded in the constitutional doctrine and precedents of this Court applicable to the protection of personal autonomy under the Fourteenth Amendment's Due Process Clause. This

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person from assisting another healthy person from committing suicide. This is because the state has a compelling interest in preserving the life of healthy persons. *Roe v. Wade*, 410 U.S. 113 (1973). It is well-settled that the state may, consistent with due process, prohibit otherwise healthy persons from doing things that are harmful to their health or safety, such as taking dangerous drugs, or driving without a seatbelt. *See e.g., Addington v. Texas*, 441 U.S. 418 (1979); *Heller v. Doe*, 113 U.S. 2637 (1993) (involuntary commitment of mentally ill persons who present a threat of danger to themselves or others).

doctrine was recently set forth by this Court in *Planned Parenthood of Pennsylvania v. Casey,* 505 U.S. __, 112 S. Ct. 2791 (1992):

> "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter .... It is settled now ... that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity .... At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."

112 S.Ct. at 2807.

The decision of a terminally ill person, in the end stages of that person's terminal illness, to hasten inevitable death and bring to an end unbearable pain and suffering is a "most basic decision[ ] about ... bodily integrity." It is a decision relating to "defining one's own concept of existence, of the meaning of the universe, and of the mystery of human life." The terminally ill person's beliefs about hastening inevitable death during the end stages of the terminal illness "could not define the attributes of personhood were they formed under the compulsion of the State."

This Court's precedents also extend strong constitutional protection to a person's entitlement to bodily integrity and control over that person's own body. These precedents recognize a woman's constitutionally-protected right to a pre-viability abortion. *Casey, supra; Roe v. Wade,*

410 U.S. 113 (1973). They recognize the right of a competent adult to make the personal decision to refuse medical treatment, including lifesaving hydration and nutrition. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). They recognize the right of a prisoner to avoid the unwanted administration of anti-psychotic drugs. *Washington v. Harper*, 494 U.S. 210 (1990). The right of a terminally ill person, in the end stages of that person's terminal illness, to make the choice to hasten inevitable death by the use of physician-prescribed medications, therefore, falls squarely within this Court's constitutional doctrine and precedents applicable to the protection of personal autonomy under the Fourteenth Amendment's Due Process Clause.

The state can have no legitimate -- let alone compelling -- governmental interest in denying terminally ill persons the right to choose to hasten inevitable death during the end stages of their terminal illness. The interest typically asserted by the state to justify a ban on "assisted suicide" is the interest in "preserving life." *But the competent terminally ill person who has chosen to hasten inevitable death has decided there is no meaningful life left to preserve.* The terminally ill person at the end stages of the illness is dying. The body has lost its struggle with disease. There is no medical treatment that can arrest the path of the disease toward inevitable death. All that the physician can do is to try to alleviate pain and suffering until death comes. The state can have no valid interest whatsoever in prolonging this process, and certainly not in prolonging suffering, yet that is exactly what the state is doing when it prohibits competent terminally ill persons from making the choice to hasten inevitable death by the use of physician-prescribed medications.

In *Casey*, this Court held that the state may not impose

an undue burden on the exercise of a person's fundamental right to reproductive choice, and that a law imposes an undue burden on that right when it presents a *substantial obstacle* to a person's exercising that right. Even assuming *arguendo* that the same standards apply to a competent, terminally ill person's decision to hasten death, an absolute ban on *any* assistance by physicians, in the form of prescribing lethal quantities of medications for the terminally ill person, or by family members or friends, imposes an undue burden on the right of a terminally ill person to make the choice to hasten inevitable death during the end stages of the terminal illness.[9]

Additionally, an absolute ban on any assistance by physicians, family members or friends imposes an undue burden on the right of a competent adult to refuse medical treatment, including lifesaving hydration and nutrition, recognized by this Court in *Cruzan*. Michigan Supreme Court Justice Charles Levin pointed out in dissent:

> Barring such persons from taking other steps to end their lives would,... constitute an undue burden on the right implicitly recognized in *Cruzan*. *Cruzan* should not be read as limiting a person to a half step when that would result in greater suffering.

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[9]The state, of course, may impose reasonable regulations on physician participation in providing assistance to the terminally ill in implementing their choice to hasten inevitable death. The state, for example, might decide to limit physician participation in providing assistance to the terminally ill to clinical physicians or to physicians who have been directly involved in the care of the terminally ill patient. The state might also decide to require a second physician's opinion to confirm that the patient has a terminal illness, and that the patient is competent to choose to hasten death.

Appendix at p. 85a. (Levin., J., concurring in part and dissenting in part.)

The present case is the first case which presents this issue decided by the highest court of a state or by a federal court of appeals to reach this Court. Other cases raising the same constitutional question of the right of the terminally ill to make the choice to hasten inevitable death are currently pending in the lower federal courts.[10] It is in the public interest that the question of whether terminally ill persons have a constitutionally-protected right to make the choice, during the end stages of their terminal illness, to hasten inevitable death by the use of physician-prescribed medications be decided authoritatively by this Court. Most surely, this question satisfies all of the elements of "an important question of constitutional law which has not been, but which should be, settled by this Court." Sup. Ct. R. 10.1(c). This Court should grant the petition for a writ of *certiorari* so that it can decide this important question.

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[10]In *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), appeal pending, 9th Cir., Docket No. 94-35534, the District Court declared the State of Washington's ban on "assisted suicide" unconstitutional insofar as it prohibited terminally ill persons from making the choice to hasten inevitable death by the use of physician-prescribed medications. A contrary result was reached in a similar challenge to New York's ban on "assisted suicide." *Quill v. Koppel*, U.S.Dist.Ct., S.D.N.Y., 12/15/94, 1994 U.S.Dist.LEXIS 17965, appeal pending *sub nom Quill v. Koppel*, 2d Cir., Docket No. 95-7028. A federal District Court in Oregon has preliminarily enjoined the implementation of that state's new law regulating physician-assisted suicides, a law enacted by the voters via a ballot proposal last November. *Lee v. Oregon*, U.S. Dist. Ct., OR, 12/27/94, No. 94-6167-HO.

CONCLUSION

For the reasons stated herein, the petition for a writ of *certiorari* to review the judgment of the Michigan Supreme Court in the present case should be granted.

Respectfully submitted,

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Dated: March 2, 1995

TABLE OF CONTENTS

Opinion of the
Michigan Supreme Court 1a-107a

Opinion of the
Michigan Court of Appeals 108a-140a

Opinion of the
Wayne County Circuit Court 141a-159a

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
Cross-Appellee,

v No. 99591

JACK KEVORKIAN,
Defendant-Appellee,
Cross-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v No. 99674

JACK KEVORKIAN,
Defendant-Appellant.

TERESA HOBBINS, MARIE DeFORD, KENNETH A. SHAPIRO, KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON,
Plaintiffs-Appellees,

v No. 99752

ATTORNEY GENERAL OF MICHIGAN,
Defendant-Appellant.

TERESA HOBBINS, MARIE DeFORD, KENNETH A. SHAPIRO, KENNETH

WEINBERGER, WILLIAM DRAKE,
ELLIOT D. LUBY, NORMAN BOLTON,
KENNETH TUCKER, KATHRYN UPTON,
and B. ELLIOT GRYSON,
Plaintiffs-Appellants,

v No. 99758

ATTORNEY GENERAL OF MICHIGAN,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v No. 99759

JACK KEVORKIAN,
Defendant-Appellee.

MEMORANDUM OPINION

These cases raise three issues with regard to the state's imposition of criminal responsibility on persons who assist others in committing suicide. Two questions are presented by the appeals in Docket Nos. 99591, 99752, and 99759: (1) whether the Michigan assisted suicide statute, MCL 752.1027; MSA 28.547 (127), was enacted in violation of Const 1963, art 4, § 24; (2) whether the criminal provisions of MCL 752.1027; MSA 28.547 (127) violate the United States Constitution. In Docket No. 99674, a case predating the assisted suicide statute, the questions presented is: (3) whether the circuit court erred in quashing the information charging the defendant with murder.

A majority of the justices is of the opinion that:

1) The assisted suicide provisions of the statute were

validly enacted and do not violate the Title-Object Clause of the Michigan Constitution. (Cavanagh, C.J., and Levin, Brickley, Boyle, Riley, Griffin, and Mallett, JJ.)

2) The United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide. (Cavanagh, C.J., and Brickley, Boyle, Riley, and Griffin, JJ.)

3) In the murder case, People v Roberts, 211 Mich 187; 178 NW 690 (1920), is overruled to the extent that it can be read to support the view that the common-law definition of murder encompasses the act of intentionally providing the means by which a person commits suicide. Only where there is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder. Where a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge is assisting in a suicide, which may be prosecuted as a common-law felony under the saving clause, MCL 750.505; MSA 28.773, in the absence of a statute that specifically prohibits assisting in a suicide. (Cavanagh, C.J., and Levin, Brickley, Griffin, and Mallett, JJ.)

4) The motion to quash must be reconsidered by the circuit court to determine whether the evidence produced at the preliminary examination was sufficient to bind the defendant over for trial (Cavanagh, C.J., and Brickley, Griffin, and Mallett, JJ.)

We reverse the judgment of the Court of Appeals in People v Kevorkian, Docket No. 99591, and People v Kevorkian, Docket No. 99759, and remand the cases to the respective circuit courts for further proceedings. In Hobbins v Attorney General, Docket Nos. 99752 and 99758, we reverse the judgment of the Court of Appeals

with regard to the claimed violation of Const 1963, art 4, § 24, and affirm in all other respects. Finally, in People v Kevorkian, Docket No. 99674, we vacate the judgment of the Court of Appeals, and remand the case to the circuit court for further proceedings.

This memorandum opinion is signed by the seven justices. There are separate concurring and dissenting opinions. However, at least four justices concur in every holding, statement, and disposition of this memorandum opinion.

CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.

These cases raise three issues with regard to the state's imposition of criminal responsibility on persons who assist others in committing suicide. Two questions are presented by the appeals in Docket Nos. 99591, 99752, and 99759: (1) Whether the Michigan assisted statute, MCL 752.1027; MSA 28.547(127), was enacted in violation of Const 1963, art 4, § 24. (2) Whether the criminal provisions of MCL 752.1027; MSA 28.547(127) violate the United States Constitution. In Docket No. 99674, a case predating the assisted suicide statute, the question presented is: (3) Whether the circuit court erred in quashing the information charging the defendant with murder.

We conclude: (1) the assisted suicide provisions of the statute were validly enacted and do not violate the Title-Object Clause of the Michigan Constitution; (2) the United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide; (3) in the murder case, the motion to quash must be reconsidered by the circuit court to determine if the evidence produced at the preliminary examination was sufficient to bind the defendant over for trial.

I

Hobbins v Attorney General
(Docket Nos. 99752, 99758)
The "Declaratory Judgment Action"

Shortly after the Legislature enacted the assisted suicide statute, a group of plaintiffs, two of whom are alleged to be suffering from terminal cancer, a friend of one of them, and seven medical care professionals, brought an action in Wayne Circuit Court, seeking a declaration that the statute was unconstitutional. The parties moved for summary judgment and the plaintiffs sought a preliminary injunction against enforcement of the statute. The circuit court found the statute to be unconstitutional.[1] First, it concluded that there were two violations of Const 1963, art 4, § 24: the statute did not have a single object, and there was a change in the purpose of the bill during its passage through the Legislature. Second, the court found a due process right to commit suicide. However, it declined to issue a preliminary injunction, concluding that hearings would be needed to determine whether the statute placed an undue burden on that right. The Attorney General filed a claim of appeal in the Court of Appeals.

People v Kevorkian
(Docket No. 99591)
The "Wayne County Assisted Suicide Case"

Also after the enactment of the assisted suicide statute, defendant Kevorkian is alleged to have assisted in the death of Donald O'Keefe. The defendant was charged under the statute and bound over after preliminary

[1]The circuit court found that the two patients, a psychiatrist, and a pharmacist had standing to challenge the statute, but that the other plaintiffs did not. The Court of Appeals did not discuss the standing question, and it has not been raised here.

examination. He moved to dismiss, and the circuit court granted the motion. The court rejected the art 4, § 24 challenges to the statute, but found a due process interest in the decision to end one's life, and that the law impermissibly burdened that interest.

The court held an evidentiary hearing to determine if the facts satisfied the four-part test that it had set forth in its opinion.[2] Following the hearing, the court issued an order concluding that the facts of the case met the standard and dismissed the charge. The prosecutor appealed to the Court of Appeals.

People v Kevorkian
(Docket No. 99759)
The "Oakland County Assisted Suicide Case"

Defendant Kevorkian was charged in two separate files with assisting in the suicides of Merion Frederick and Ali Khalili. The defendant was bound over after a preliminary examination in one case and waived examination in the other. The circuit court granted the defendant's motion to dismiss. The court discussed the potential privacy and liberty interests in ending one's life, concluding that a person does have the right to commit suicide. However, it further concluded that defendant Kevorkian lacked

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[2]The standard that the trial court had announced was the following:

> [T]his Court finds that when a person's quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person's decision to commit suicide is a reasonable response to the condition causing the quality of life to be significantly impaired, and the decision to end one's life is freely made without undue influence, such a person has a constitutionally protected right to commit suicide.

standing to challenge the statute.[3] The court also found that the statute was unconstitutional because it had more than one object and because its purpose was changed during its passage through the Legislature. The prosecuting attorney appealed.

People v Kevorkian
(Docket No. 99674)
The "Oakland County Murder Case"

Before the statute was enacted, defendant Kevorkian allegedly assisted in the deaths of Sherry Miller and Marjorie Wantz on October 23, 1991. He was indicted by a citizens' grand jury on two counts of murder.[4] After a preliminary examination, the defendant was bound over for trial.[5] In the circuit court, the defendant moved to dismiss, and the circuit judge granted the motion, concluding that assisting in suicide does not fall within the crime of murder. The prosecutor appealed.

II

The Court of Appeals issued its decisions in two sets of opinions on May 10, 1994. One decision dealt with the cases involving the assisted suicide statute.[6] The majority

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[3]The Court of Appeals did not discuss the question of standing, and it has not been raised in this Court.

[4]As permitted by statute, the indictment did not specify the degree of murder. See MCL 750.318; MSA 28.550, MCL 767.71; MSA 28.1011.

[5]The defendant also had been indicted on one count of delivering a controlled substance for other than legitimate and professionally recognized purposes. MCL 333.7401(1); MSA 14.15(7401)(1). However, the district judge dismissed the drug count.

[6]Hobbins v Attorney General, 205 Mich App 194; 518 NW2d 487 (1994).

concluded that the assisted suicide statute was unconstitutional because the act had more than one object, in violation of art 4, § 24. Though recognizing that it arguably was not necessary to deal with the remaining issue, the majority went on to consider whether the statute violated the United States Constitution. The majority concluded that there was no violation, and that the state was free to make it a criminal offense to assist another in committing suicide.[7]

The appeal regarding the murder case was decided separately.[8] The majority[9] concluded that the circuit court erred in quashing the information.

III

The prosecuting authorities in each of the assisted suicide cases appealed the conclusion that the assisted suicide statute was enacted in violation of Const 1963, art 4, § 24. Defendant Kevorkian filed a cross appeal with regard to the United States constitutional issue in the Wayne County assisted suicide case, and the plaintiffs in the declaratory judgment action filed their own application for leave to appeal on that issue. In the murder case, defendant Kevorkian filed an application for leave to

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[7]The majority opinion was written by Judge E. Thomas Fitzgerald. The other judges on the panel, Clifford W. Taylor, and Washtenaw Circuit Judge Donald E. Shelton, sitting by assignment, wrote separate opinions. Judge Shelton concurred with regard to the art 4, § 24 issue, but dissented with regard to the United States constitutional violation. Judge Taylor concurred that the statute did not violate the United States Constitution, but would have found no art 4, § 24 violation.

[8]People v Kevorkian No 1, 205 Mich App 180; 517 NW2d 293 (1994).

[9]The opinion was written by Judge Fitzgerald, and concurred in by Judge Taylor. Judge Shelton dissented.

appeal. On June 6, 1994, we granted the applications, 445 Mich 917, and the cases were argued on October 4, 1994.

IV

A

During 1991, several bills were introduced in the Legislature regarding the subject of assisting in suicide. The bill that ultimately became 1992 PA 270 was introduced on March 7, 1991, as HB 4501. As originally introduced, it would have created the Michigan Commission on Death and Dying that was to study "voluntary self-termination of life" and related subjects and report its recommendations to the Legislature.[10] It was referred to the Judiciary Committee, and there were public hearings in December 1991. The committee reported a substitute bill to the House on November 12, 1992.

On November 24, the House amended the substitute bill by adding a section that would make it a crime to assist another in committing suicide,[11] and the bill passed the House on that date.[12] The Senate passed the bill on

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[10]The title of the bill read:

> A bill to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; and to provide for the development of legislative recommendations concerning certain issues related to death and dying.

[11]Two other bills had been pending at the time of the introduction of HB 4501 that included criminal penalties for assisting suicide. HB 4038; SB 32. The language added to HB 4501 was very similar to that of SB 32.

[12]The title was amended to reflect the presence of the new provisions:

> A bill to create the Michigan commission on death and

December 3, 1992, and it was signed by the Governor on December 15. 1992 PA 270. It was to be effective March 31, 1993, ninety days after the legislative session, as provided by Const 1963, art 4, § 27.

On January 26, 1993, SB 211 was introduced to amend § 7 of 1992 PA 270, which contained the criminal penalties.[13] It passed the Senate on February 11. On February 25, the House approved a substitute, which, among other things, provided that the act, including both the commission and criminal provisions, would be effective on February 25, 1993. The Senate concurred in the substitute, and the Governor signed the bill that same day. 1993 PA 3.[14]

> dying; to prescribe its membership, powers, and duties; to provide for the development of legislative recommendations concerning certain issues related to death and dying; *to prohibit certain acts pertaining to the assistance of suicide; to prescribe penalties: and to repeal certain parts of this act on a specific date*. [Emphasis added.]

[13]MCL 752.1027; MSA 28.547(127). It also provided that the criminal provisions would expire six months after the commission reported to the Legislature.

[14]Under 1993 PA 3, the provision that makes it illegal to assist in a suicide reads as follows:

> (1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00. or both:
>
> (a) Provides the physical means by which the other person attempts or commits suicide.
>
> (b) Participates in a physical act by which the other person attempts or commits suicide.

Each house had voted to give the act immediate effect, and thus the act was effective on February 25, 1993. The enrolled bill[15] sets forth the full text of each section of the act as required by Const 1963, art 4, § 25. Pursuant to the statute, the Commission on Death and Dying was constituted and prepared its final report to the Legislature.

B

Const 1963, art 4, § 24 provides as follows:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by

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(2) Subsection (1) shall not apply to withholding or withdrawing medical treatment.

(3) Subsection (1) does not apply to prescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.

(4) This section shall take effect February 25, 1993.

(5) This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4. [MCL 752.1027; MSA 28.547(127).]

[15]As enacted, the title read as follows:

An act to prohibit certain acts pertaining to the assistance of suicide; to provide for the development of legislative recommendations concerning certain issues related to death and dying, including assistance of suicide; to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; to prescribe penalties; and to repeal certain parts of this act on a specific date.

its title.[16]

Three kinds of challenges may be brought against statutes on the basis of Const 1963, art 4, § 24: (1) a "title-body" challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge. No "title-body" challenge, claiming that the title of the act does not adequately express the content of the law, is before us. However, the other two bases for contesting the statute are presented.

The circuit court in both the declaratory judgment action and the Oakland County assisted suicide case held that the statute had more than one object and that the purpose of HB 4501 was changed during its passage through the Legislature.

The Court of Appeals majority reached only the multiple-object challenge and affirmed the circuit court decisions.[17]

We would hold that both art 4, § 24 challenges of the statute are without merit, and reverse.

1

Multiple-Object Challenge

The purpose of the constitutional provision now found in art 4, § 24 was stated by Justice Cooley fifteen years after such language was included in the Constitution of 1850:

> The history and purpose of this constitutional

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[16]Similar language has been in each Michigan Constitution since 1850. Const 1850, art 4, §§ 20, 25; Const 1908, art 5, §§ 21, 22.

[17]As noted above, the circuit court in the Wayne County assisted suicide case rejected the art 4, § 24 challenge.

provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it [People ex rel Drake v Mahaney, 13 Mich 481, 494-495 (1865).]

The provision is not meant to be applied restrictively. Kuhn v Treasury Dep't, 384 Mich 378, 387-388; 183 NW2d 796 (1971). See also Local No 644 v Oakwood Hosp Corp, 367 Mich 79, 91; 116 NW2d 314 (1962):

> Numerous cases have held that the "object" of a statute is the general purpose or aim of the enactment. The legislature may empower a body

> created by it to do everything requisite, necessary, or expedient to carry out the principal objective to be attained. Legislation, if it has a primary object, is not invalid because it embraces more than 1 means of attaining its primary object. In re Brewster Street Housing Site, 291 Mich 313 [289 NW 493 (1939)].

With all but the simplest of statutes, it would be possible to select one section, describe the "object" of that section, and be able to reason, as the Court of Appeals majority did in this case, that the remaining sections have different objects. The flaw in this approach is in defining the object of 1992 PA 270 as being limited to the content of the bill as originally introduced. The Court of Appeals said:

> The original purpose of HB 4501, as expressed in both the title and body of the bill, was to create a new public act to study certain issues related to death and dying. This bill had no regulatory authority. When HB 4501 was amended to add the substance of SB 32, the additional provisions had another and different objective - to amend the Penal Code to create the crime of criminal assistance to suicide. [205 Mich App 194, 201-202: 518 NW2d 487 (1994).]

In so reasoning, the Court of Appeals majority confused the analysis to be used in multiple-object cases with that appropriate in assessing a challenge based on a change of purpose theory. The object of the legislation must be determined by examining the law as enacted, not as originally introduced.

We would find the instant statute clearly to embrace

only one object.[18] While the cases cited by the parties involving multiple-object challenges concern quite different statutes, an examination of those cases that have found multiple-object violations[19] and those that have not[20]

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[18]The Court of Appeals majority said that although the statute encompasses a single "subject," it has two primary objectives. As noted earlier, the Court of Appeals reached that conclusion by artificially selecting as the object of the bill its content as originally introduced. Further, the terms "subject" and "object" are largely equivalent for the purpose of analyzing these issues, and are often used interchangeably by the courts, e.g., Livonia v Dep't of Social Services, 423 Mich 466, 499; 378 NW2d 402 (1985); Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich 441, 465-466; 208 NW2d 469 (1973). Even the Court of Appeals majority did so in the instant case:

> The purpose of the one-object provision is to avoid bringing into one bill diverse subjects that have no necessary connection. Mooahesh [v Treasury Dep't, 195 Mich App 551, 564; 492 NW2d 246 (1992)]. [205 Mich App 199.]

[19]For example, in Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich 123; 240 NW2d 193 (1976), the statute (1) established a political ethics commission, (2) set forth requirements for candidate committees, (3) imposed filing statements with respect to contributions and expenditures, (4) placed limits on campaign expenditures, (5) established a state campaign fund, (6) regulated lobbying activities, and (7) repealed five existing laws.

In People v Carey, 382 Mich 285; 170 NW2d 145 (1969), this Court held that it was improper to include in the statute dealing with the supervision, regulation, and control of motor vehicles for hire, a provision purporting to give inspectors appointed by the Public Service Commission the same powers as police officers.

In Hildebrand v Revco Discount Drug Centers, 137 Mich App 1; 357 NW2d 778 (1984), the Court of Appeals found it unconstitutional to include in the Michigan Civil Rights Act a provision restricting the use of polygraph results in employment decisions.

demonstrates that the instant case falls squarely within the category of permissible joining of statutory provisions.

The Court of Appeals majority sought to distinguish People v Trupiano, 97 Mich App 416; 296 NW2d 49 (1980), on which the prosecutors relied, on the ground that the statute in question in that case (the Public Health Code)[21] involved a legislative enactment constituting a

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[20]In Builders Square v Agriculture Dep't, 176 Mich App 494, 499; 440 NW2d 639 (1989), it was argued that the statute had two objects -- regulation of pricing and regulation of deceptive advertising. However, the Court of Appeals rejected that contention and upheld the constitutionality of the act:

> We do not believe the item pricing and deceptive advertising act violates the title-object clause of the Michigan Constitution. The purpose of title-object clause, namely notice, was satisfied. Although dissimilar, the act's two objectives, regulation of pricing and advertising, are not so diverse in nature as to be at odds with the constitution. Further, the objects are consistent with the overall purpose, consumer protection. Since the title of the act need not be an index of its provisions, it is inconsequential that the act fails to mention consumer protection. A fair reading of the title demonstrates its purpose.

Jacobson v Carlson, 302 Mich 448; 4 NW2d 721 (1942), involved an amendment of the motor vehicle statute that dealt solely with the subject of pedestrians and sidewalks. This Court found that statute not to be in violation of the Title-Object Clause.

In Kull v State Apple Comm, 296 Mich 262; 296 NW 250 (1941), this Court upheld an act that contained provisions ranging from promoting the consumption and sale of apples to taxing apple production, creating an apple commission, and providing penalties. While the act addressed four seemingly diverse matters, it was proper to join them because all related to the regulation of the apple industry.

[21]The Public Health Code includes criminal penalties for controlled substance violations as well as many other provisions. MCL 333.1101 *et seq.*; MSA 14.15(1101) et seq.

"code."[22] However, there is no "code exception" in art 4, § 24. Rather, the caves upholding codes against multiple-object challenges are at most an extension of the liberality with which such challenges are reviewed.

The Court of Appeals majority suggested that the Legislature could have included the provisions regarding the commission and the criminal penalties in the same bill if it had used a more general title:

> Had the Legislature intended to codify or regulate the general "subject" of assisted suicide, it could have notified the public of this intention by declaring a single broad purpose and by joining the object contained in HB 4501 with the object contained in SB 32 together in one bill. This the Legislature did not do. This failure resulted in the body of the act containing two distinct objects. The fact that the title was amended to reflect the addition of § 7 does not cure the constitutional infirmity. The one-object provision may not be circumvented by creating a title that includes different legislative objects. Hildebrand v Revco Discount Drug Centers, 137 Mich App 1, 11; 357

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[22]The Trupiano Court said:

> The Supreme Court has recognized a wide degree of discretion in reviewing legislative enactments which constitute a "code." In Advisory Opinion re Constitutionality of 1972 PA 294, *supra*, the Court noted at 463:
>
> "Emphasis is given to the fact that the subject matter constitutes a code and that inherently the scope of a code must be broad enough to encompass the various facets necessary to the drafting of a unified law. If we fail to permit such a design codes may not be enacted in Michigan so long as the 'one-object' limitation is present in the constitution." [Trupiano at 420.]

NW2d 778 (1984). [205 Mich App 202-203.]

This emphasis on the title is misplaced. It cannot be said that a statute has two objects if its title specifically describes its content, but only one if the title is general. Insofar as one of the purposes of the Title-Object Clause is to provide notice of the content of a bill to the Legislature and the public, a more specific title better achieves that purpose, particularly regarding a fairly short bill like the one in this case. Elsewhere in its opinion, the Court of Appeals majority itself recognized that one looks to the body of the act, not the title, to determine whether it has a single object:

> While the object must be expressed in the title, the body of the law must be examined to determine whether it embraces more than one object. Kent Co ex rel Bd of Supervisors of Kent County v Reed, 243 Mich 120, 122; 219 NW 656 (1928). [205 Mich App 199.]

The Hobbins plaintiffs and defendant Kevorkian also argue that there was a multiple-object violation because the provisions could have been enacted in separate bills. They rely on Advisory Opinion on Constitutionality of 1975 PA 227 (Question One), 396 Mich 123, 129; 240 NW2d 193 (1976):

> "The provisions in these two sections might have been enacted in separate laws without either of them in any way referring to or affecting the other." [Quoting Kent Co ex rel Bd of Supervisors v Reed, *supra* at 122.]

This principle is unsound. There is virtually no statute that could not be subdivided and enacted as several bills. It is precisely that kind of "multiplying" of legislation that we seek to avoid with the liberal construction given to art

4, § 24.[23]

Accordingly, we would hold that the assisted suicide statute embraces only one object and thus was validly enacted.

2

Change in Purpose Challenge[24]

The Hobbins plaintiffs also challenge the statute on the ground that its purpose was changed during its passage through the Legislature. They point to Anderson v Oakland Co Clerk, 419 Mich 313, 329; 353 NW2d 448 (1984), as establishing that the objectives of that provision are to "preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration . . . ." The provision is integrally related to the "five-day rule" of art 4, § 26, which states that no bill can be passed until it has been printed or reproduced and in the possession of each house for at least five days. They maintain that those principles have been violated in this statute. After the bill was introduced, the Legislature amended HB 4501 to add a provision criminalizing assisted suicide. The Hobbins plaintiffs say that this amendment dramatically changed the purpose of the original bill, which was to create a study commission. Thus, it is argued, the

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[23]In fact, the instant statute might well be upheld even if that principle were valid. The criminal penalties section provides that it "is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4." Thus, it could not have been separately enacted without reference to the commission provisions.

[24]As noted earlier, although the Court of Appeals majority did not address this issue, the circuit court in both the Oakland County assisted suicide case and the declaratory judgment action found a change of purpose challenge to be meritorious.

Legislature was able to enact a law making assisted suicide a criminal offense without giving the people an opportunity to be heard on this highly charged and emotional issue. Looking at the legislative calendar for the day on which the amendment was made, the Hobbins plaintiffs find reference only to an act to create the Commission on Death and Dying.

In response to the prosecuting authorities' argument that the later enactment of 1993 PA 3 cured the defect, the plaintiffs maintain that the argument is "structurally unsound" and misstates the effect of the reenactment of an amended law. They contend that the constitutional violation was complete when 1992 PA 270 was enacted, and that 1993 PA 3 merely amended the former act in minor respects and gave it immediate effect.

The argument by the plaintiffs fails to take into account that the criminal penalties for assistance to suicide were an interim measure tied to the Legislature's continuing consideration of issues related to death and dying, including those to be covered in the report of the commission. Thus, the penalties can be viewed as simply providing a stable environment while the Commission on Death and Dying, the Legislature, and the citizenry studied these questions further.

Moreover, cases interpreting the change of purpose clause indicate that the test for determining if an amendment or substitute changes a purpose of the bill is whether the subject matter of the amendment or substitute is germane to the original purpose.[25] The test of

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[25]See, *e.g.*, United States Gypsum Co v Dep't of Revenue, 363 Mich 548; 110 NW2d 698 (1961); Commuter Tax Ass'n v Detroit, 109 Mich App 667; 311 NW2d 449 (1981); People v Clopton, 117 Mich App 673; 324 NW2d 128 (1982).

germaneness is much like the standard for determining whether a bill is limited to a single object. As we held above, the creation of the commission and the provision of criminal penalties were appropriately placed in the same bill.

We also agree with the prosecuting authorities that any problems with the enactment of 1992 PA 270 were eliminated with the enactment of 1993 PA 3. The plaintiffs do not claim that the later act is independently subject to attack on a change of purpose ground. It is a basic principle of statutory construction that an amending statute replaces the former provisions. As we explained in Lahti v Fosterling, 357 Mich 578, 587-588; 99 NW2d 490 (1959):

> This Court in People v Lowell, 250 Mich 349, 354-356 [230 NW 202] (1930), said:
>
> "An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute. Repugnancy is not the essential element of implied repeal of specifically amended sections. The rule is:
>
> "'Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.' 25 RCL [Statutes § 159], p 907. .
>
> "Nevertheless, the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former. 1 Lewis, Sutherland Statutory Construction (2d ed), § 237.
>
> "It is plain from the authorities in this State and elsewhere that the effect of an act amending

> a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely and substitute the new section in its place. This effect is not an arbitrary rule adopted by the courts. It is the natural and logical effect of an amendment 'to read as follows.' It accomplishes precisely what the words import. Any other construction would do violence to the plain language of the legislature."

1993 PA 3 amended each section of 1992 PA 270, and the entire text was reprinted and reenacted. The enacting clause stated that those sections were "amended to read as follows . . . ."

Further, it is clear that an amending statute can remedy a constitutional defect in the original act. As noted in 1A Singer, Sutherland Statutory Construction (5th ed), § 22.04, p 182, "[s]ome courts have indicated that an unconstitutional act is legally nonexistent and cannot be given effect by an attempt to amend it." However, as the treatise goes on to explain:

> A majority of courts seem to have rejected the theory that an unconstitutional act has no existence, at least for the purpose of amendment. The unconstitutional act physically exists in the official statutes of the state and is available for reference, and as it is only unenforceable, the purported amendment is given effect. . . .
>
> This escape from the legal fiction that an unconstitutional act does not exist is sound. That fiction serves only as a convenient method of stating that an unconstitutional act gives no rights or imposes no duties. . . . Amendment offers a convenient method of curing a defect in an unconstitutional act. [*Id.* at 183.]

This principle has been followed in Michigan cases,[26] and is fully applicable here. The statute under which defendant Kevorkian has been charged is MCL 752.1027; MSA 28.547(127), as amended by 1993 PA 3, which was not enacted in violation of the change of purpose clause.

Accordingly, we would hold that the assisted suicide provisions of MCL 752.1027; MSA 28.547(127) are not void by reason of violation of Const 1963, art 4, § 24.

V

A

Having found that Michigan's assisted suicide statute does not violate Const 1963, art 4, § 24, we now address whether the statute runs afoul of the United States Constitution. In its opinion of May 10, 1994, the Court of Appeals rejected this argument. So do we.

The Due Process Clause of US Const, Am XIV commands the states not to "deprive any person of life, liberty, or property, without due process of law . . . ." Thus, the threshold question in this case is whether the clause encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance.

B

Those who assert that there is such a right rely heavily on decisions of the United States Supreme Court in abortion and so-called "right to die" cases. Focusing especially on Planned Parenthood of Southeastern

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[26]See, *e.g.*, People v De Blaay, 137 Mich 402, 404-405; 100 NW 598 (1904), Briggs v Campbell, Wyant & Cannon Foundry Co, 2 Mich App 204, 218-219; 139 NW2d 336 (1966), and Kriger v South Oakland Co Mutual Aid Pact, 49 Mich App 7, 13-15; 211 NW2d 228 (1973) (amendment cured title-object defect), rev'd on other grounds 399 Mich 835 (1977).

Pennsylvania v Casey, 505 US ___; 112 S Ct 2791; 120 L Ed 2d 674 (1992), and Cruzan v Director, Missouri Dep't of Health, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), these advocates argue that the right to end one's own life is a fundamental liberty interest, grounded in the notion of personal autonomy and springing from common-law concepts of bodily integrity and informed consent. They further contend that an integral part of this protected interest is the right to assistance, hence the term "assisted suicide."[27]

We do not discern in Cruzan and its historic roots an indication that the federal constitution protects a right more expansive than the right to refuse to begin or to continue life-sustaining medical treatment. Neither do we find in Casey or in the precedent from which it evolved an intent to expand the liberty interests identified by the Court in such a manner.

C

Cruzan was the first case to present to the United States Supreme Court the issue whether the federal

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[27]The Hobbins plaintiffs object to the term "assisted suicide." They concede that there is no right under the Due Process Clause to commit "ordinary" suicide, with or without assistance. They assert only the right of mentally competent, terminally ill persons "to make the choice to hasten inevitable death," particularly by the use of lethal quantities of physician-prescribed medications. However, the common definition of "suicide" is the intentional killing of oneself by any means, and the temporal proximity of death is irrelevant to the threshold inquiry into whether the constitution encompasses such a right. We thus do not believe that it would be appropriate to use euphemistic language, even in the context of a challenge that purports to be limited to the plight of the terminally ill. We agree with the Attorney General that there is a risk that such phraseology will disguise the reality of the very sober questions that we must decide.

constitution grants a so-called "right to die."[28] 497 US 277. The Court was asked in Cruzan to decide the validity of a state statute that prohibited a Missouri couple from halting the artificial nutrition and hydration of their brain-damaged daughter, absent clear and convincing evidence of her wishes.

In upholding the Missouri statute, the majority observed that the constitutional right of a competent person to refuse unwanted medical treatment could be inferred from prior Supreme Court decisions.[29] 497 US

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[28]The case generally regarded as the landmark decision concerning the refusal of life-sustaining medical treatment is In re Quinlan, 70 NJ 10; 355 A2d 647 (1976), cert den sub nom Garger v New Jersey, 429 US 922 (1976). In Quinlan, the New Jersey Supreme Court reasoned that a comatose young woman had a privacy right grounded in the federal constitution to be free from bodily invasion by further treatment (a respirator), that the right was not diminished by her mental incompetency, and that her father could refuse such treatment on her behalf.

[29]In tracing the history of cases involving the right to refuse medical treatment, the Court discussed the doctrine of informed consent that embraces the common-law notion of "bodily integrity," i.e., "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 497 US 269, quoting Union Pacific R Co v Botsford, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). The Cruzan Court said that the logical corollary of the doctrine of informed consent is that a patient generally has a right not to consent, *i.e.*, a right to refuse treatment.

By footnote, the Court observed that although many state courts had found a right to refuse medical treatment in a generalized constitutional right of privacy, the Supreme Court had not. Rather, the Court had determined that the issue more properly is analyzed in terms of a Fourteenth Amendment liberty interest. See Cruzan, 497 US 279, n 7, citing Bowers v Hardwick, 478 US 186, 194-195; 106 S Ct 2841; 92 L Ed 2d 140 (1986).

278. For purposes of analysis, the Court "assumed" that there also was a constitutional right to halt lifesaving hydration and nutrition. However, the Court emphasized that such a liberty interest would have to be balanced against relevant state interests. The interests advanced in Cruzan -- the preservation of life[30] and the safeguarding of an incompetent person's wishes against potential abuses -- were found sufficient to sustain the evidentiary requirement.[31]

Casey was decided two years after Cruzan. There, the Court was asked to decide the validity of a Pennsylvania abortion statute that included an "informed consent" requirement, a waiting period, and a "spousal notification" provision. In upholding all but the notification provision,[32]

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[30]The Court said that the state could "properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . ." *Id.* at 282.

[31]The Cruzan Court said that the "clear and convincing evidence" standard was appropriate not only because of the importance of the interests at issue, but also because the standard serves as a "societal judgment" about how the risk of error should be distributed between the litigants. "The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." In the case of an effort to terminate life-sustaining medical treatment for an incompetent person, an erroneous decision to continue treatment simply maintains the status quo. An erroneous decision to stop such treatment, however, is not susceptible to correction. 497 US 283.

[32]With respect to the notification provision, the Court observed:

> It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family

the Court reaffirmed the essential tenet of Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Bd 2d 147 (1973), reh den 410 US 959 (1973), which includes recognition of a woman's right under the Due Process Clause to terminate a pregnancy in its early stages, without undue interference from the state. That right is protected by "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." 120 L Ed 2d 695.

The Casey Court explained that Roe "stands at the intersection of two lines of decisions . . . ." 120 L Ed 2d 701. Although this holding of Roe was grounded in a liberty interest relating to intimate relationships, the family, and childbearing, Roe also may be seen as a rule "of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." 120 L Ed 2d 702. The choice of doctrinal category made no difference to the result in Casey, the Court said. It added that Roe also could be classified as sui generis. *Id.* at 701-702.

Drawing from Cruzan and Casey, the Hobbins plaintiffs[33] and defendant Kevorkian advance several

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but upon the very bodily integrity of the pregnant woman. [120 L Ed 2d 727.]

[33]The Attorney General contends that the Hobbins plaintiffs are presenting a facial challenge to the statute, and that their claim thus must fail if there is any set of circumstances under which the assisted suicide statute would be valid. United States v Salerno, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). The plaintiffs argue that Casey changed the analysis for a liberty interest, and that Salerno is not applicable. Both positions, however, assume too much. Before a facial challenge analysis can proceed, it first must be determined whether there is a constitutionally protected right. In light of our decision that there is no liberty interest in committing suicide, it is

theories why this Court should find that there is a protected liberty interest in assisted suicide, at least with regard to the terminally ill.[34] All of the theories, of course, assume a fundamental liberty interest in suicide itself.[35]

The parties contend that the right to assistance in ending one's life is an integral part of "personal autonomy."[36] They emphasize that the Casey Court rejected a "formula" approach to deciding which rights are protected by the Fourteenth Amendment, and also the notion that new rights cannot emerge. Instead, the Court described the characteristics that are shared by protected "liberty" interests:

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unnecessary for us to determine the proper analysis.

[34]No clear definition of "terminal illness" is medically or legally possible, since only in hindsight is it known with certainty when someone is going to die. One definition that has been suggested is an illness so progressed that death is likely within twelve months. Note, *A failed statute, Geoffrey Feiger, and the phrenetic physician: Physician-assisted suicide in Michigan and a patient-oriented alternative*, 28 Val Univ L R 1415, 1434, n 121 (1994). Another definition appears in MCL 333.21417; MSA 14.15(21417), which concerns eligibility for admission to a hospice:

> An individual shall be considered to have a disease or condition with a terminal prognosis if, in the opinion of a physician, the individual's death is anticipated within 6 months after the date of admission to the hospice.

[35]An attempt to find a liberty interest in assisted suicide independent of a liberty interest in suicide itself cannot succeed. If the Due Process Clause does not encompass a fundamental right to end one's life, it cannot encompass a right to assistance in ending one's life.

[36]One commentator points out that assertion of a right of personal autonomy begs the question, "'[a]utonomy to do what?'" Tsarouhas, *The case against legal assisted suicide*, 20 Ohio Northern Univ L R 793, 803 (1994).

> These matters [marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. [120 L Ed 2d 698.]

The proponents of assisted suicide further argue that the right to commit suicide is analogous to the right to refuse unwanted medical treatment, to discontinue life support, to use contraception, and to choose abortion. They submit that the decision to end one's life is the ultimate right of self-determination, and that the state cannot abridge the right unless it can articulate a compelling interest.[37]

The advocates of assisted suicide ask us to adopt the reasoning of a recent federal decision that invalidated the State of Washington's criminal prohibition against assisted suicide. The court held in Compassion in Dying v

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[37]While acknowledging that the state may regulate assistance in suicide, or even actively discourage one from committing suicide, in order to advance its interest in preserving life, the proponents of assisted suicide maintain that the state's legitimate interest does not extend to prolonging suffering of the terminally ill by criminalizing suicide assistance. We find it unnecessary to consider the proper reach of the state's regulatory interest because we disagree with the foundational premise that there exists a constitutionally protected liberty interest to commit suicide.

Washington, 850 F Supp 1454, 1461 (WD Wash, 1994),[38] that the right of a terminally ill person to the assistance of a physician in committing suicide is analogous to the right of abortion because both fall within the "'realm of personal liberty which the government may not enter.'"[39]

The federal court found that the rationale in Casey was "almost prescriptive" of the right to end one's life. The court held that, under Casey, the state cannot proscribe assisted suicide if such a ban would unduly burden the right to commit suicide, *i.e.*, if the purpose of the ban is to place a substantial obstacle in the path of the person seeking to exercise the right.

The federal court also found that the right of a terminally ill person to commit suicide with assistance does not differ in a constitutional sense from the right recognized in Cruzan to refuse life-sustaining medical treatment.[40] The essential premise of the court's holding was that, in each instance, the liberty interest is "the freedom to make choices according to one's individual conscience about those matters which are essential to

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[38]Appeal pending in the United States Court of Appeals for the Ninth Circuit (Docket No. 94-35534).

[39]The federal court appears to have limited its ruling to situations in which the person who wants to die performs the final act that actually brings about death. The case concerned the right to commit suicide "by taking a lethal dose of physician-prescribed drugs." *Id.* at 1456.

[40]The court recognized that the Supreme Court only had "assumed" such an interest in Cruzan for purposes of analysis, but expressed confidence that if the issue was squarely presented, such a right would be found.

personal autonomy and basic human dignity." *Id.* at 1461.[41]

We disagree with the federal court that either Cruzan or Casey preordains that the Supreme Court would find that any persons, including the terminally ill, have a liberty interest in suicide that is protected by the Fourteenth Amendment. Those who assert such a right misapprehend the nature of the holdings in those cases.

D

In Cruzan, the Court was able to "assume" a protected liberty interest in the withdrawal of life-sustaining medical treatment because it was able to distinguish between acts that artificially sustain life and acts that artificially curtail life. Although some suggest that this is a distinction without constitutional significance -- a meaningless exercise in semantic gymnastics -- the Cruzan majority disagreed[42] and so do we.

Indeed, the notion that there is a difference between

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[41]In this regard, we observe that a right of personal autonomy cannot exist independent of a recognition of human dignity, and that it would violate the concept of human dignity to measure the value of a person's life by that person's physical and mental condition. See Cruzan, 497 US 282. Further, because all persons possess a basic right to personal autonomy, regardless of their physical or mental condition, there would be no principled basis for restricting a right to commit suicide to the terminally ill. The inevitability of death adds nothing to the constitutional analysis.

[42]Further, the Cruzan Court was careful not to extend its decision in that case even to other issues concerning medical treatment:

> [I]n deciding "a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." [497 US 277-278.]

action and inaction is not unfamiliar to the law. For example, the distinction between "misfeasance" and "nonfeasance" (the distinction between active misconduct and passive inaction) is deeply rooted in the law of negligence. The reason for the distinction is said to lie in the fact that a defendant creates a new risk of harm by misfeasance, but merely fails to benefit another by nonfeasance. As Dean Prosser explains, the duty to do no wrong is a legal duty, while the duty to protect against wrong is, for the most part, a moral obligation. Prosser & Keeton, Torts (5th ed), § 56, pp 373-374.[43]

Similarly, whereas suicide involves an affirmative act to end a life, the refusal or cessation of life-sustaining medical treatment simply permits life to run its course, unencumbered by contrived intervention. Put another way, suicide frustrates the natural course by introducing an outside agent to accelerate death, whereas the refusal or withdrawal of life-sustaining medical treatment allows nature to proceed, *i.e.*, death occurs because of the

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[43]Professor Kamisar suggests that the distinction is based more on historical and pragmatic compromise than on logic. He reasons that what is at issue are what Dean Guido Calabresi of Yale Law School called "tragic choices," *i.e.*, choices that confront us when fundamental beliefs clash. The goal is to find "solutions that permit us to assert that we are cleaving to both beliefs in conflict." Concerning the issue of refusing to begin or to continue life-sustaining medical treatment, the conflict is between (a) respecting a patient's wishes, relieving suffering, and putting an end to seemingly futile medical treatment, and (b) affirming the supreme value of life and maintaining the salutary principle that the law protects all human life, no matter how poor the quality. The professor concludes that the distinction between assisted suicide and "letting die" is not perfectly neat and logical, then asks, "But what line is?" Kamisar, *After assisted suicide, what next?*, Texas Lawyer (June 13, 1994), pp 1-2.

underlying condition.[44]

The distinction between the withdrawal of life-sustaining medical treatment and suicide is recognized in the Guidelines for State Court Decision Making In Life-Sustaining Medical Treatment, National Center for State Courts (2d ed), pp 143-145 (1992). The guidelines include the following:

> There are significant moral and legal distinctions between letting die (including the use of medications to relieve suffering during the dying process) and killing (assisted suicide/ euthanasia). In letting die, the cause of death is seen as the underlying disease process or trauma. In assisted suicide/euthanasia, the cause of death is seen as the inherently lethal action itself.

We agree that persons who opt to discontinue life-sustaining medical treatment are not, in effect, committing suicide. There is a difference between choosing a natural death summoned by an uninvited illness or calamity, and deliberately seeking to terminate one's life by resorting to death-inducing measures unrelated to the natural process of dying. McKay v Bergstedt, 106 Nev 808, 820; 801 P2d 617 (1990).

In affirming a lower court decision to discontinue artificial sustenance for a profoundly retarded woman who was in a persistent vegetative state, the Supreme Judicial Court of Massachusetts similarly emphasized the "well-settled" principle that withdrawing or refusing life-sustaining medical treatment is not equivalent to

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[44]A close examination of the medical-treatment cases suggests that they do not establish a right to choose "nonlife" at all, but rather a right to choose life's natural progression-a progression that, without fail, includes for everyone the process of dying.

attempting suicide. Guardianship of Jane Doe, 411 Mass 512, 521; 583 NE2d 1263 (1992), cert den sub nom Doe v Gross, 503 US ___; 112 S Ct 1512; 117 L Ed 2d 649 (1992). The vigorous dissents in Doe were not offered in support of a broader right to die, but rather in recognition of the state's paramount interest in protecting life.[45]

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[45]One dissenting justice, for instance, accused the court of deciding "to play God." 411 Mass 525. He complained that the court had involved itself in the matter ostensibly to protect the interests of the vulnerable, but then had taken advantage of the patient's vulnerability "to fashion an argument that she is a social, medical and familial burden and that her simple, fundamental needs should no longer be met." 411 Mass 529. Two other dissenters said that the majority, in effect, had approved the notion of suicide. They wrote:

> Society's respect for the value of every human life without reference to its condition, the cornerstone of American law, is inconsistent with a State's recognition of a legal right to commit suicide, assist suicide, or engage in voluntary euthanasia (mercy killing in accordance with the wishes of the suffering person). "The life of those to whom life has become a burden -- of those who are hopelessly diseased or fatally wounded -- nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live." Recognition of the dignity of human life demands resistance, rather than concession, to the real or imaginary death wishes of those who are afflicted with pain, depression, a sense of personal worthlessness, or a sense of burdensomeness to others. A humane society provides support of every kind, including moral support, to those who are burdened in order that they may live . . . .
>
> Can it reasonably be doubted that legal acceptance of suicide, assisted suicide, and voluntary euthanasia presents a serious risk that acceptance of involuntary euthanasia (mercy killing not chosen by the affected individual) is soon to follow? [411 Mass 531-532 (citation omitted).]

In its first case involving the cessation of life-sustaining medical treatment, the Kentucky Supreme Court found that withdrawal of nutrition and hydration from a person in a persistent vegetative state, and with irreversible brain damage, fits the medical definition of "permit[ting] the natural process of dying." DeGrella v Elston, 858 SW2d 698, 707 (Ky, 1993). The court cautioned that it was not engaging in "an objective inquiry into the quality of life, but a subjective inquiry into whether the patient wishes the continuation of medical procedures to interdict 'the natural process of dying.'"

> At the point where the withdrawal of life--prolonging medical treatment becomes solely another person's decision about the patient's quality of life, the individual's "inalienable right to life," as so declared in the United States Declaration of Independence and protected by Section One (1) of our Kentucky Constitution, outweighs any consideration of the quality of the life, or the value of the life, at stake. [*Id.* at 702.]

These and other recent decisions of the highest courts of other states bolster our conclusion that Cruzan does not portend that the United States Supreme Court would find a fundamental liberty interest in suicide, let alone assisted suicide, that is protected by the Due Process Clause of the Fourteenth Amendment.

E

1

Neither does Casey provide support for the position that the Due Process Clause encompasses a fundamental right to commit suicide. In Casey, the Court was not directly concerned with the establishment of a new right, but rather with whether the Court should retreat from the right previously recognized in Roe v Wade. In declining to

overrule Roe, and relying heavily on the doctrine of *stare decisis*, the Court emphasized that abortion cases are unique. 120 L Ed 2d 698.

Although the Court in Casey was not called upon to determine the merits of a newly asserted due process right, it is well settled that the Due Process Clause shelters both procedural and substantive rights. Casey, 120 L Ed 2d 695. The latter includes those rights that have been selectively incorporated from the Bill of Rights, and those that have been found to be "fundamental."

The state argues that in determining those fundamental rights not expressly identified in, but nonetheless protected by, the Due Process Clause, the analysis must be guided by a search for whether the asserted right is implicit in the concept of ordered liberty or deeply rooted in our nation's history and traditions. See Palko v Connecticut, 302 US 319, 325-326; 58 S Ct 149; 82 L Ed 288 (1937), and Snyder v Massachusetts, 291 US 97, 105; 54 S Ct 330; 78 L Ed 674 (1934).[46]

Those who urge this Court to find a fundamental liberty interest in suicide under the Due Process Clause challenge the traditional analysis, arguing that the United States Supreme Court articulated in Casey a new, broader inquiry to be employed in the adjudication of substantive due process claims. They submit that even if such a right cannot be inferred from Casey, it nonetheless exists as a rational extension of those liberty interests previously recognized under a principled application of the proper test for determining whether an asserted right is protected

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[46]See also Michael H v Gerald D, 491 US 110, 121-122; 109 S Ct 2333; 105 L Ed 2d 91 (1989).

by the Due Process Clause.[47]

We acknowledge that the United States Supreme Court said in Casey that courts are to exercise reasoned judgment in assessing claims of substantive due process, and that the analysis is "not susceptible of expression as a simple rule." 120 L Ed 2d 697. However, we need not resolve the debate over whether the Court established a new test because further examination of the principles discussed in Casey reveals that the constitutional inquiry described in that case does not fall so far outside the "implicit in the concept of ordered liberty" and "deeply rooted in history and tradition" analysis as to lead to a different conclusion here.

Thus, in the present context, consistent with the

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[47]As suggested by various *amici curiae*, it is important to the analysis of substantive due process that the asserted right be framed in a precise and neutral manner. This is critical in cases involving end-of-life questions, which are particularly susceptible to emotion-laden terminology and flawed syllogisms. The approach of the United States Supreme Court in assessing whether a proposed right is "fundamental" has been to narrow the threshold inquiry by applying three principles: (1) the focus should be on the specific activity that proponents argue is protected by the constitution, taking into account all relevant facts, (2) the formulation should not be so broad as to encompass activities that are logically distinct and involve separate considerations, and (3) the formulation should reasonably accommodate all of the interests at stake. Bopp & Coleson, *Webster and the future of substantive due process*, 28 Duquesne L R 271, 281-291 (1990). See Webster v Reproductive Health Services, 492 US 490; 109 S Ct 3040; 106 L Ed 2d 410 (1989).

The question presented in this case thus is not whether a person has a constitutional right of self-determination, or a right to define personal existence, or a right to make intimate and personal choices, or a right not to suffer. Rather, the question that we must decide is whether the constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance.

observations of Justice Harlan[48] quoted approvingly and expanded upon in Casey, 120 L Ed 2d 697-698, we must determine whether the asserted right to commit suicide arises from a rational evolution of tradition, or whether recognition of such a right would be a radical departure from historical precepts. We conclude that the principles that guide analysis of substantive due process do not support the recognition of a right to commit suicide.

2

Although acts of suicide are documented throughout the recorded history of England and this nation, we find no indication of widespread societal approval. To the contrary, suicide was a criminal offense, with significant stigmatizing consequences.[49] As a policy matter, and for practical reasons, suicide was not criminalized in most states. 2 LaFave & Scott, Substantive Criminal Law, § 7.8, pp 246-251. Lawmakers recognized the futility of punishment and the harshness of property forfeiture and other consequences. *Id.*

Also, it was assumed that one who committed suicide was suffering from a mental frailty of one sort or another, and thus lacked the necessary mens rea to commit a crime. Marzen, O'Dowd, Crone & Balch, *Suicide: A constitutional right?*, 24 Duquesne L R 1, 63, 69, 85-86, 88-89 (1985).

One who assisted a suicide was accorded no such

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[48]Poe v Ullman, 367 US 497, 542; 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

[49]At common law, suicide sometimes was referred to as "self murder." Consequences included the forfeiture of property and an ignominious burial. Tsarouhas, n 36 *supra* at 795, citing Glanville, *The Sanctity of Life and the Criminal Law*, 261-62 (1957), and 4 Blackstone, Commentaries on the Laws of England (Oxford: Clarendon Press, 1769), pp 189, 190.

concession, however.[50] At the time the Fourteenth Amendment was ratified, at least twenty-one of the thirty-seven existing states (including eighteen of the thirty ratifying states) proscribed assisted suicide either by statute or as a common law offense. *Id.* at 76.

Presently, a substantial number of jurisdictions have specific statutes that criminalize assisted suicide,[51] and the

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[50]There is no historical exception for physician-assisted suicide. To the contrary, such involvement traditionally has been regarded as contrary to the Hippocratic Oath, which includes the following sentence: "'To please no one will I prescribe a deadly drug, nor give advice which may cause his death.'" Steadman's Medical Dictionary (5th Unabridged Lawyers' Ed), p 650.

[51]Alaska, Alas Stat 11.41.120(a)(2); Arizona, Ariz Rev Stat Ann 13-1103(A)(3); Arkansas, Ark Code Ann 5-10-104(a)(2); California, Cal Penal Code 401; Colorado, Colo Rev Stat 18-3-104(1)(b); Connecticut, Conn Gen Stat Ann 53a-56(a)(2); Delaware, Del Code Ann, tit 11, § 645; Florida, Fla Stat Ann 782.08; Georgia, Ga Code Ann 16-5-5(b); Hawaii, Hawaii Rev Stat 707-702(1)(b); Illinois, 720 Ill Comp Stat Ann 5/12-31; Indiana, Ind Stat Ann 35-42-1-2; Kansas, Kan Stat Ann 21-3406; Kentucky, Ky Rev Stat 216:302; Maine, Me Rev Stat Ann, tit 17-A, § 204; Michigan, Act of December 15, 1992, 1992 PA 270 (creating Michigan commission on death and dying and prohibiting certain acts pertaining to suicide assistance); Minnesota, Minn Stat Ann 609.215; Mississippi, Miss Code Ann 97-3-49; Missouri, Mo Rev Stat 565.023; Montana, Mont Code Ann 45-5-105; Nebraska, Neb Rev Stat 28-307; New Hampshire, NH Rev Stat Ann 630:4; New Jersey, NJ Stat Ann 2C:11-6; New Mexico, NM Stat Ann 30-2-4; New York, NY Penal Law 120.30; North Dakota, ND Cent Code 12.1-16-04; Oklahoma, Okla Stat Ann, tit 21, §§ 813 to 818; Pennsylvania, 18 Pa Cons Stat Ann 2505; Puerto Rico, PR Laws Ann, tit 33, § 4009; South Dakota, SD Codified Laws Ann 22-16-37; Tennessee, Tenn Code Ann 39-13216; Texas, Tex Penal Code Ann 22.08; Virgin Island, Vi Code, tit 14, § 2141; Washington, Wash Rev Code Ann 9A.36.060; and Wisconsin, Wis Stat Ann 940.12. The State of Oregon also has a statute that forbids assisted suicide. Or Rev Stat 163.125(1)(b). However, we note that Oregon voters passed a ballot initiative called

Model Penal Code also provides for criminal penalties.[52] Further, nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations,[53] or in "living will" statutes.[54] In addition, all states provide for the

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the Death with Dignity Act on November 8, 1994. The act, which permits physicians, under certain circumstances, to prescribe lethal medication for terminally ill persons, was scheduled to take effect December 8, 1994. However, a federal district court has issued a temporary restraining order pending a hearing on the matter.

[52]The Model Penal Code of the American Law Institute prohibits assisted suicide and grants a privilege to those who use force to prevent a suicide. Sections 210.5, p 91, and 3.07(5), pp 104-105.

[53]See, for example, MCL 700.496; MSA 27.5496, which permits the appointment of a "patient advocate" to act on the patient's behalf if the patient is not competent to do so. Subsection 20 of the statute states that designation of a patient advocate "shall not be construed to condone, allow, permit, authorize, or approve suicide or homicide." MCL 700.496(20); MSA 27.5496(20). Other jurisdictions with similar provisions in statutes governing durable powers of attorney in health-care situations include the District of Columbia, DC Code Ann 21-2212; Illinois, Ill Comp Stat Ann, ch 755, § 40/50; Indiana, Ind Code Ann 30-5-5-17(b); Iowa, Iowa Code Ann 144B.12.2; Massachusetts, Mass Ann Laws, ch 201D, § 12; New York, NY Pub Health 2989(3); North Dakota, ND Cent Code 23-06.5-01: and Rhode Island, RI Gen Laws 23-4.10-9(f).

[54]Jurisdictions that have such provisions in "living will" statutes include Alabama, Ala Code 22-8A-10; Alaska, Alas Stat 18.12.080(f); Arizona, Ariz Rev Stat Ann 36-3210; Arkansas, Ark Code Ann 20-17-210(g); California, Cal Health & Safety Code 7191.5(g); Colorado, Colo Rev Stat 15-18-112(1); District of Columbia, DC Code Ann 6-2430; Florida, Fla Stat Ann 765.309(1): Georgia, Ga Code Ann 88-4111(b): Hawaii, Hawaii Rev Stat 327D-13; Illinois, Ill Comp Stat Ann, ch 755, § 35/9(f); Indiana, Ind Code Ann 16-36-4-19; Iowa, Iowa Code Ann 144A.11.6; Kansas, Kan Stat Ann 65-28, 109; Kentucky, KY Rev Stat Ann 311.637; Louisiana, La Rev Stat Ann, 40:1299.58.10.A; Maine, Me Rev Stat Ann, tit 18-A, § 5-711(g); Maryland, Md Health

involuntary commitment of persons who may harm themselves as the result of mental illness,[55] and a number of states allow the use of nondeadly force to thwart suicide attempts.[56]

It is thus incorrect to conclude, on the basis of the absence of criminal penalties for an act of suicide itself and the existence of a pragmatic capacity to commit suicide, that there is a constitutional right to commit suicide.[57] Such a right is not expressly recognized anywhere in the

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Gen Code Ann 5-611(c); Minnesota, Minn Stat Ann 145B.14; Mississippi, Miss Code Ann 41-41-117(2); Missouri, Mo Ann Stat 459.055(5); Montana, Mont Code Ann 50-9-205(7); Nebraska, Neb Rev Stat 20-412(7); Nevada, Nev Rev Stat Ann 449.670; New Hampshire, NE Rev Stat Ann 137-H:10(II); North Carolina, NC Gen Stat 90-320(b); North Dakota, ND Cent Code 23-06.4-01; Ohio, Ohio Rev Code Ann, tit 21, § 2133.12(D); Oklahoma, Okla Stat Ann, tit 63, § 3101.12(g); Oregon, Or Rev Stat 127.645(1); Pennsylvania, 20 Pa Cons Stat Ann 5402(b); Rhode Island, RI Gen Laws 23-4.11-10(f); South Carolina, SC Code Ann 44-77-130; South Dakota, SD Cod Laws Ann 34-12D-20; Texas, Tex Health & Safety Code Ann 672.020; Utah, Utah Code Ann 75-2-1118; Virginia, Va Code Ann 54.1-2990; Washington, Wash Rev Code Ann 70.122.100; West Virginia, W Va Code 16-3010; and Wisconsin, Wis Stat Ann 154.11(6).

[55]See, e.g., MCL 330.1401(a); MSA 14.800(401)(a).

[56]Alas Stat 11.81.430(a)(4); Ark Code Ann 5-10-104(a)(2); Colo Rev Stat 18-1-703(1)(d); Hawaii Rev Stat 703-308(1); Ky Rev Stat 503.100(1)(a); Mo Rev Stat 563.061(5); NH Rev Stat Ann 627:6(VI); NJ Stat Ann 2C:3-7(e); NY Penal Law 35.10(4); Or Rev Stat 161.209; 18 Pa Cons Stat Ann 508(d); Wis Stat Ann 939.48(5).

[57]For reasons apparent in our analysis of the due process claims, we also reject the argument that Michigan's assisted suicide statute is invalid because it denies equal protection to terminally ill persons who want help in ending their lives, *i.e.*, it denies them a right enjoyed by terminally ill persons who opt to forgo or discontinue life-sustaining medical treatment. As we explained, the two situations are not the same for purposes of constitutional analysis.

United States Constitution or in the decisions of the United States Supreme Court, and cannot be reasonably inferred.[58] In fact, as we observed earlier in this opinion, those courts that have found a right to refuse to begin or to continue life-sustaining medical treatment have done so only after concluding that such refusal is wholly different from an act of suicide.[59]

Indeed, the United States Supreme Court repeatedly and unequivocally has affirmed the sanctity of human life and rejected the notion that there is a right of self-destruction inherent in any common-law doctrine or constitutional phrase. In Cruzan, the majority observed:

> As a general matter, the States -- indeed, all civilized nations -- demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically

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[58]The Supreme Court of Canada said in Rodriguez v British Columbia, 107 DLR4th 342, 401-404 (1993), that no western democracy expressly permits assisted suicide. To the contrary, the criminal codes of most countries include a blanket ban of such conduct, and such proscriptions have not been adjudged to be unconstitutional or contrary to fundamental human rights.

[59]The right to refuse medical treatment meets the "ordered liberty" and the "historical underpinnings" tests because it is rooted in the common-law doctrine of informed consent, which embodies the notion of bodily integrity. A person may refuse life-sustaining medical treatment because the treatment itself is a violation of bodily integrity. Suicide enjoys no such foundational support, however. When one acts to end one's life, it is the intrusion of the lethal agent that violates bodily integrity.

able adult to starve to death. [497 US 280.]

On the basis of the foregoing analysis, we would hold that the right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition. It would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause.

F

We are keenly aware of the intense emotions and competing moral philosophies that characterize the present debate about suicide in general, and assisted suicide in particular. The issues do not lend themselves to simple answers. However, while the complexity of the matter does not permit us to avoid the critical constitutional questions, neither does it, under the guise of constitutional interpretation, permit us to expand the judicial powers of this Court, especially where the question clearly is a policy one that is appropriately left to the citizenry for resolution, either through its elected representatives or through a ballot initiative under Const 1963, art 2. § 9.[60]

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[60]We are mindful of Justice Cardozo's admonition nearly half a century ago:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. Be is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." [The

We would hold that the Due Process Clause of the federal constitution does not encompass a fundamental right to commit suicide, with or without assistance, and regardless of whether the would-be assistant is a physician.

VI

A

Finally, we turn to the issue presented in the Oakland County case involving the deaths of Sherry Miller and Marjorie Wantz. Their deaths occurred before the enactment of Michigan's ban on assisted suicide, and the question is whether defendant Kevorkian can be prosecuted for his role in the deaths.

Each woman was said to be suffering from a condition that caused her great pain or was severely disabling. Each separately had sought defendant Kevorkian's assistance in ending her life. The women and several friends and relatives met the defendant at a cabin in Oakland County on October 23, 1991.

According to the testimony presented at the defendant's preliminary examination, the plan was to use his "suicide machine." The device consisted of a board to which one's arm is strapped to prevent movement, a needle to be inserted into a blood vessel and attached to IV tubing, and containers of various chemicals that are to be released through the needle into the bloodstream. Strings are tied to two of the fingers of the person who intends to die. The strings are attached to clips on the IV tubing that control the flow of the chemicals. As explained by one

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Nature of the Judicial Process, quoted in In re President & Directors of Georgetown College, Inc, 118 US App DC 90, 97; 331 F2d 1010 (1964) (Burger, J., concurring in dissent). cert den 377 US 978 (1964).]

witness, the person raises that hand, releasing a drug called methohexital, which was described by expert witnesses as a fast-acting barbiturate that is used under controlled circumstances to administer anesthesia rapidly.[61] When the person falls asleep, the hand drops, pulling the other string, which releases another clip and allows potassium chloride to flow into the body in concentrations sufficient to cause death.

The defendant tried several times, without success, to insert the suicide-machine needle into Ms. Miller's arm and hand. He then left the cabin, returning several hours later with a cylinder of carbon monoxide gas and a mask apparatus. He attached a screw driver to the cylinder, and showed Ms. Miller how to use the tool as a lever to open the gas valve.

The defendant then turned his attention to Ms. Wantz. He was successful in inserting the suicide-machine needle into her arm. The defendant explained to Ms. Wantz how to activate the device so as to allow the drugs to enter her blood stream. The device was activated,[62] and Ms. Wantz

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[61]A large enough dose can cause the recipient to stop breathing.

[62]No one who testified at the preliminary examination actually witnessed the activation of the device. The only persons in the cabin at that time were the decedents, the defendant, and the defendant's sister, who since has died. Ms. Wantz' husband was walking away from the cabin. He testified as follows:

> Q. You don't know who pulled the string?
>
> A. I have no idea. She knew that she had to pull the string when I left.
>
> Q. You don't know if she tried to pull the string and it didn't work and Kevorkian pushed her hand at all, do you?
>
> A. I can say this, when I left the room she was in the process of trying to pull the string.

died.[63]

The defendant then placed the mask apparatus on Ms. Miller. The only witness at the preliminary examination who was present at the time said that Ms. Miller opened the gas valve by pulling on the screw driver. The cause of her death was determined to be carbon-monoxide poisoning.

The defendant was indicted on two counts of open murder. He was bound over for trial following a preliminary examination. However, in circuit court, the defendant moved to quash the information and dismiss the charges, and the court granted the motion.

B

A divided Court of Appeals reversed. People v Kevorkian No 1, 205 Mich App 180; 517 NW2d 293 (1994). The Court of Appeals majority relied principally on People v Roberts, 211 Mich 187; 178 NW 690 (1920).

In Roberts, the defendant's wife was suffering from advanced multiple sclerosis and in great pain. She previously had attempted suicide and, according to the

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Q. You don't know who pulled the string? That's what you're telling me?

A. I can tell you she was in the process of trying to pull the string when I left the room, but I did not see her pull the string. The only thing I can take and tell you is once I left the room, Dr. Kevorkian did -- I heard Dr. Kevorkian say, "Marj, you have to hold your hand up," and that is the only thing I know.

[63]The pathologist who performed the autopsy testified that there was a lethal level of methohexital in Ms. Wantz' blood, but that because of the body's release of potassium on death, no conclusions could be drawn regarding potassium chloride.

defendant's statements at the plea proceeding, requested that he provide her with poison. He agreed, and placed a glass of poison within her reach. She drank the mixture and died. The defendant was charged with murder. He pleaded guilty, and the trial court determined the crime to be murder in the first degree.

The defendant appealed. He argued, among other things, that because suicide is not a crime in Michigan, and his wife thus committed no offense, he committed none in acting as an accessory before the fact. The Court rejected that argument, explaining:

> If we were living in a purely common-law atmosphere with a strictly common-law practice, and defendant were charged with being guilty as an accessory of the offense of suicide, counsel's argument would be more persuasive than it is. But defendant is not charged with that offense. He is charged with murder and the theory of the people was that he committed the crime by means of poison. He has come into court and confessed that he mixed poison with water and placed it within her reach, but at her request. The important question, therefore, arises as to whether what defendant did constitutes murder by means of poison. [211 Mich 195.]

After discussing a similar Ohio case, Blackburn v State, 23 Ohio St 146 (1872), the Roberts Court concluded:

> We are of the opinion that when defendant mixed the paris green with water and placed it within reach of his wife to enable her to put an end to her suffering by putting an end to her life, he was guilty of murder by means of poison within the meaning of the statute, even though she requested him to do so. By this act he deliberately

> placed within her reach the means of taking her own life, which she could have obtained in no other way by reason of her helpless condition. [211 Mich 198.]

In the instant case, defendant Kevorkian had argued that the discussion of this issue in Roberts was *dicta* because the defendant in that case had pleaded guilty of murder, and thus the controlling authority was People v Campbell, 124 Mich App 333: 335 NW2d 27 (1983).[64] The Court of Appeals majority rejected that view and said that Roberts controlled the issue presented in the instant case.

C

We agree with the Court of Appeals that the holding

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[64]In Campbell, the decedent and the defendant had been drinking heavily at the decedent's home. The decedent had been talking about suicide, and the fact that he did not have a gun. The defendant offered to sell the decedent a gun. At first, the decedent did not accept the offer. However, defendant Campbell persisted in alternately encouraging and ridiculing him. Eventually, the defendant provided the decedent with a gun and five shells. The defendant and the decedent's girlfriend left, and some time later, the decedent shot himself. The defendant was charged with open murder.

Although the defendant failed to persuade the circuit court to quash the information, the Court of Appeals reversed. Among other things the Court said that more recent Supreme Court decisions had "cast doubt" that Roberts remained good law. The Court also noted that the trial judge in Roberts had "assumed that a murder had occurred and considered only the degree of that crime." 124 Mich App 337.

The Campbell panel further found that the defendant did not have the required "present intention to kill." He only "hoped" that the decedent would kill himself, and "hope" is not the degree of intent required to sustain a charge of murder. *Id.* at 339.

in Roberts was not *dicta*.[65] While it is true that defendant Roberts pleaded guilty of placing a poisonous mixture at the bedside of his sick wife, knowing that she intended to use it to commit suicide, nothing in the opinion indicates that this Court based its affirmance of the conviction of first-degree murder on the fact that the conviction stemmed from a guilty plea.

However, it is not sufficient in the instant case to decide simply that the holding in Roberts was not *dicta*. We must determine further whether Roberts remains viable, because, as noted in People v Stevenson, 416 Mich 383, 390; 331 NW2d 143 (1982):

> This Court has often recognized its authority, and indeed its duty, to change the common law when change is required.[66]

The crime of murder has been classified and categorized by the Legislature, see MCL 750.316; MSA 28.548 and MCL 750.317; MSA 28.549, but the definition of murder has been left to the common law. People v Aaron, 409 Mich 672; 299 NW2d 304 (1980); People v

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[65] "When a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." Chase v American Cartage Co. Inc. 176 Wis 235, 238 (186 NW 598 [1922]). [Detroit v Public Utilities Comm, 288 Mich 267. 299-300: 286 NW 368 (1939).]

[66] Citing People v Aaron, 409 Mich 672, 713; 299 NW2d 304 (1980); Placek v Sterling Heights, 405 Mich 638; 275 NW2d 511 (1979); Serafin v Serafin, 401 Mich 629; 275 NW2d 461 (1977); Beech Grove Investment Co v Civil Rights Comm, 380 Mich 405; 157 NW2d 213 (1968); Myers v Genesee Auditor, 375 Mich 1; 133 NW2d 190 (1965).

Scott, 6 Mich 287 (1859). Unless abrogated by the constitution, the Legislature, or this Court, the common law applies. Const 1963, art 3, § 7; Aaron, *supra* at 722-723.

Under the common-law definition, "'[m]urder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in peace of the state, with malice prepense or aforethought, either express or implied.'" Aaron, *supra* at 713, quoting People v Potter, 5 Mich 1 (1858). Implicit in this definition is a finding that the defendant performed an act that caused the death of another. To convict a defendant of criminal homicide, it must be proven that death occurred as a direct and natural result of the defendant's act. People v Barnes, 182 Mich 179, 196; 148 NW 400 (1914). See also People v Flenon, 42 Mich App 457, 460; 202 NW2d 471 (1972) ("a defendant's [first-degree murder] conviction should only be sustained where there is a reasonable and direct causal connection between the injury and death").

Early decisions indicate that a murder conviction may be based on merely providing the means by which another commits suicide.[67] However, few jurisdictions, if any, have retained the early common-law view that assisting in a suicide is murder. The modern statutory scheme in the majority of states treats assisted suicide as a separate crime, with penalties less onerous than those for murder. See, *e.g.*, 1993 PA 3, which was enacted by our own Legislature.[68]

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[67]See Marzen, *supra* at 79-81.

[68]See also n 51. In addition, the Model Penal Code incorporates this view:

> (1) Causing Suicide as Criminal Homicide. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by

Recent decisions draw a distinction between active participation in a suicide and involvement in the events leading up to the suicide, such as providing the means. Frequently, these cases arise in the context of a claim by the defendant that the prosecution should have been brought under an assisted suicide statute. The courts generally have held that a person may be prosecuted for murder if the person's acts went beyond the conduct that the assisted suicide statute was intended to cover.

For example, in People v Cleaves, 229 Cal App 3d 367;

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force, duress or deception.

(2) Aiding or Soliciting Suicide as an Independent Offense. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor. [Model Penal Code, § 210.5.]

In commentary to its provision detailing sanctions against suicide assistance, the drafters of the Model Penal Code discussed the rationale supporting its recommendations, as well as expressing concern over the severity of the penalty imposed in Roberts:

> The fact that penal sanctions will prove ineffective to deter the suicide itself does not mean that the criminal law is equally powerless to influence the behavior of those who would aid or induce another to take his own life. Moreover, in principle it would seem that the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim. On the other hand, cases such as People v Roberts, where a husband yielded to the urging of his incurably sick wife to provide her with the means of self-destruction, sorely test the resiliency of a principle that completely fails to take account of the claim for mitigation that such a circumstance presents. [ALA, Model Penal Code § 210.5, commentary at 100.]

280 Cal Rptr 146 (1991), the defendant was charged with first degree murder in the strangulation death of another man. The trial court had refused a defense request to instruct the jury on the statutory offense of aiding and abetting a suicide, and the jury convicted him of second-degree murder.

In deciding whether an instruction on the statutory offense of aiding and abetting suicide should have been given, the appellate court accepted the defendant's detailed version of the events. The decedent in Cleaves was suffering from AIDS and wanted the defendant's assistance in strangling himself. With the defendant's help, the decedent trussed his body in an arched position, with his face down on a pillow. The defendant's role, when the decedent "pulled down" on the truss to effect strangulation, was to put his hand on the decedent's back to steady him. At one point, when the sash slipped from the decedent's neck, the defendant rewrapped it at the decedent's request and retied it to the decedent's hands. By straightening out his body with his feet, the decedent was in sole control of how tight the sash was around his neck. In holding that the trial judge properly refused to instruct the jury under the assisted suicide statute, the appeals court said:

> [The statute] provides: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." As explained by our Supreme Court, the "key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide. If the defendant merely furnishes the means, he is guilty of aiding a suicide; if he actively participates in the death of the suicide victim, he is guilty of murder." In re Joseph G (1983) 34 Cal 3d 429, 436 1194 Cal Rptr 163, 667 P2d 1176, 40 ALR4th 690]. The statute

providing for a crime less than murder "'does not contemplate active participation by one in the overt act directly causing death. It contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death, the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder. But where a person actually performs, or actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim . . . .'" People v Matlock (1959) 51 Cal 2d 682, 694 [336 P2d 505; 71 ALR2d 605]. [1229 Cal App 3d 375.]

In Cleaves, viewing the evidence most favorable for the defense, the court said there were no facts to support the requested instruction on aiding and abetting an assisted suicide. Although the defendant may not have applied pressure to the ligature itself, he admitted that his act of holding the decedent to keep him from falling off the bed was designed to assist the decedent in completing an act of strangulation. "This factual scenario indisputably shows active assistance in the overt act of strangulation," the court said. *Id.* at 376.

Similarly, in State v Sexson, 117 NM 113; 869 P2d 301 (NM App, 1994), cert den 117 NM 215 (1994), the defendant was charged with first-degree murder in connection with the fatal shooting of his wife. He was convicted of second-degree murder following a bench trial, and argued that he should have been prosecuted under the state's assisted suicide statute.

The only fact in dispute in Sexson was whether it was the defendant or the decedent who actually pulled the trigger of the rifle that killer her. It was not disputed that there was a suicide agreement between the two, and that the pact was genuine. The defendant claimed simply to have held the rifle in position while the decedent pulled the trigger, and that he had failed to then kill himself because he "freaked out" when the decedent continued to breathe after being shot.

The appellate court rejected the defendant's argument that he could not be prosecuted under the more general murder statute because of the specific assisted suicide statute. In so doing, the court emphasized that the two statutes proscribed different conduct:

> The wrongful act triggering criminal liability for the offense of assisting suicide is "aiding another" in the taking of his or her own life. It is well accepted that "aiding, n in the context of determining whether one is criminally liable for their involvement in the suicide of another, is intended to mean providing the means to commit suicide, not actively performing the act which results in death. . . .
>
> There are three different views about the criminal liability of one who, whether pursuant to a suicide pact or not, solicits (by talk) or aids (as by providing the means of self-destruction) another to commit suicide. Occasionally aiding or soliciting suicide has been held to be no crime at all on the ground that suicide is not criminal. That view is most certainly unsound. At one time many jurisdictions held it to be murder, but a great many states now deal specifically with causing or aiding suicide by statute, treating it either as a form of manslaughter or as a separate crime. Such

> statutes typically do "not contemplate active participation by one in the overt act directly causing death," and thus their existence is not barrier to a murder conviction in such circumstances.
>
> In contrast, the wrongful act triggering criminal liability for second degree murder is "kill[ing]" or "caus[ing] the death" of another. In the context of the instant case, the second degree murder statute is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. . . . [117 NM ___; 869 P2d 304 (citations omitted).]

Turning to the evidence presented in Sexson, the court reiterated that the distinction accepted in other jurisdictions between murder and aiding suicide "generally hinges upon whether the defendant actively participates in the overt act directly causing death, or whether he merely provides the means of committing suicide." 869 P2d 304-305. This distinction applies even where the decedent has given consent or requested that actual assistance be provided. In Sexson, the defendant admitted holding the rifle in a position calculated to assure the decedent's death. The court concluded: "That action transcends merely providing Victim a means to kill herself and becomes active participation in the death of another." 869 P2d 305.

In the years since 1920, when Roberts was decided, interpretation of causation in criminal cases has evolved in Michigan to require a closer nexus between an act and a death than was required in Roberts. See, *e.g.*, People v

Flenon, *supra*; People v Scott, 29 Mich App 549, 558; 185 NW2d 576 (1971). The United States Supreme Court also has addressed the importance of relating culpability to criminal liability. See Tison v Arizona, 481 US 137; 107 S Ct 1676; 95 L Ed 2d 127 (1987); Mullaney v Wilbur, 421 US 684, 697-698; 95 S Ct 1881; 44 L Ed 2d 508 (1975).

In the context of participation in a suicide, the distinction recognized in In re Joseph G, *supra* at 436, constitutes the view most consistent with the overwhelming trend of modern authority. There, the California Supreme Court explained that a conviction of murder is proper if a defendant participates in the final overt act that causes death, such as firing a gun or pushing the plunger on a hypodermic needle. However, where a defendant is involved merely "in the events leading up to the commission of the final overt act, such as furnishing the means . . . ," a conviction of assisted suicide is proper. *Id.*

As noted, this Court has modified the common law when it perceives a need to tailor culpability to fit the crime more precisely than is achieved through application of existing interpretations of the common law. See, *e.g.*, Stevenson, *supra*; Aaron, *supra*. For the reasons given, we perceive such a need here. Accordingly, we would overrule Roberts to the extent that it can be read to support the view that the common-law definition of murder encompasses the act of intentionally providing the means by which a person commits suicide[69]. Only where there

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[69]Because Roberts involved a guilty plea, the facts were not well developed. If in fact the defendant's only act was to prepare the poison and leave it for his wife to drink, and she did so knowingly and voluntarily, we would not find that sufficient participation to constitute murder. In the suicide setting, it is not enough that the defendant merely provided the means of death to be convicted of murder, or participated in the events leading up to the act that directly caused

is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder.[70] Where a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge

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death if the defendant did not participate in the act that did directly cause death.

[70]However, there may be circumstances where one who recklessly or negligently provides the means by which another commits suicide could be found guilty of a lesser offense, such as involuntary manslaughter. There are a number of cases in which providing a gun to a person known to the defendant to be intoxicated and despondent or agitated has constituted sufficient recklessness to support such a conviction. For example, in People v Duffy, 79 NY2d 611, 613; 595 NE2d 814 (1992), the defendant provided a gun to the intoxicated and despondent decedent, who had said he wanted to kill himself, and urged him to "blow his head off." The decedent proceeded to shoot himself. Duffy was indicted for two counts of manslaughter in the second degree. The first count alleged that he had intentionally caused or aided the deceased in committing suicide (NY Penal Law § 125.15131), and the second alleged that he had recklessly caused the death (NY Penal Law § 125.15[1]). After a jury trial, the defendant was acquitted of the first count, but convicted of the second. The New York Court of Appeals concluded:

> [T]he conduct with which defendant was charged clearly fell within the scope of section 125.15 (l)'s proscription against recklessly causing the death of another person. As the People aptly observe, a person who, knowing that another is contemplating immediate suicide, deliberately prods that person to go forward and furnishes the means of bringing about death may certainly be said to have "consciously disregard[ed] a substantial and unjustifiable risk" that his actions would result in the death of that person . . . . [79 NY2d 614.]

See also State v Bier, 181 Mont 27; 591 P2d 1115 (1979); Persampieri v Commonwealth, 343 Mass 19; 175 NE2d 387 (1961); State v Marti, 290 NW2d 570 (Iowa, 1980).

is assisting in a suicide.

However, even absent a statute that specifically proscribes assisted suicide, prosecution and punishment for assisting in a suicide would not be precluded. Rather, such conduct may be prosecuted as a separate common-law offense under the saving clause of MCL 750.505; MSA 28.773:[71]

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.[72]

Our reinterpretation of the common law does not enlarge the scope of criminal liability for assisted suicide, but rather reduces liability where a defendant merely is

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[71]Suicide is, by definition, the killing of oneself. Our analysis recognizes a distinction between killing oneself and being killed by another. Because suicide is not murder and is no longer viewed as criminal, see above at pp 38-39, assisting suicide is its own species of crime.

Our opinion would leave undisturbed the law of aiding and abetting because aiding and abetting necessarily requires the commission of an offense by a principal. See People v Kelly, 423 Mich 261; 378 NW2d 365 (1985).

[72]See State v Carney 69 NJL 478, 480; 55 A 44 (1903), (concluding that a failed attempt at suicide was criminal under the New Jersey saving clause, which made all "offenses of an indictable nature at common law," not otherwise provided for, misdemeanors); State v Willis, 255 NC 473; 121 SE2d 854 (1961) (finding an attempt to commit suicide to be an indictable misdemeanor under North Carolina's saving clause).

involved in the events leading up to the suicide, such as providing the means. Therefore, there is no violation of the prohibition on ex post facto laws. US Const, art I, § 9; Const 1963, art 1, § 10. See Stevenson, *supra* at 399-400.

D

The decision regarding whether an examining magistrate erred in binding a defendant over for trial is one that should be made in the first instance by the trial court. In this case, the lower courts did not have the benefit of the analysis set forth in this opinion for evaluating the degree of participation by defendant Kevorkian in the events leading to the deaths of Ms. Wantz and Ms. Miller.[73] Accordingly, we remand this matter to the circuit court for reconsideration of the defendant's motion to quash in light of the principles discussed in this opinion.[74]

VII

For the reasons given, we would reverse the judgment of the Court of Appeals in Docket Nos. 99591 and 99759, and remand the cases to the respective circuit courts for further proceedings. In Docket Nos. 99752 and 99758, we would reverse the judgment of the Court of Appeals with

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[73]A lower court's ruling on a motion to quash involving factual matters is reviewed by an appellate court for an abuse of discretion, and rulings regarding issues of law are reversed if erroneous. People v Thomas, 438 Mich 448, 452; 475 NW2d 288 (1991).

[74]Remanding to the circuit court for reconsideration of the motion to quash will not usurp the fact-finding function of the ultimate trier of fact. Bindover decisions by magistrates, and the review of those decisions by trial courts, necessarily involve preliminary factual determinations, although the standard to be employed is one of probable cause rather than guilt beyond a reasonable doubt. MCR 6.110(E).

regard to the claimed violation of Const 1963, art 4, § 24, and affirm in all other respects. Finally, in Docket No. 99674, we would vacate the judgment of the Court of Appeals, and remand the case to the circuit court for further proceedings in accordance with this opinion.

BOYLE, J. (concurring in part and dissenting in part).

I agree with the lead opinion that § 7 of 1993 PA 3 does not violate the Title-Object Clause of the Michigan Constitution[1] in its entirety. I also agree with the lead opinion's result and rationale finding that the act is not violative of a fundamental right protected by the Due Process Clause of the state or federal constitution. In addition, as stated in the observations of Justice Harlan[2]2 quoted approvingly in Planned Parenthood of Southeastern Pennsylvania v Casey, 505 US ___; 112 S Ct 2791; 120 L Ed 2d 674, 697-698 (1992), and the expansion on those principles that follow, the task of the judiciary is to strike a balance between the respect for the liberty of the individual and the demands of organized society. Such balance should be struck with due respect to history and rationally evolving tradition. Thus, in the present context, the process of rational evolution must focus on a determination whether the question of assisted suicide can be left to the political process without intrusion on a protected liberty interest, eschewing either a radical departure from tradition or the moral code of individual judges. I agree that it can.

I do not agree with the lead opinion's redefinition of the statutory offense of murder to exclude participation in

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[1]Const 1963, art 4, § 24.

[2]Poe v Ullman, 367 US 497, 542; 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

the events leading up to the death, including, without limitation, providing the means and all other acts save that of the final act precipitating death. A person who participates in the death of another may be charged with murder, irrespective of the consent of the deceased. Nor do I agree with the lead opinion's conclusion or rationale justifying a charge of assisted suicide under the saving clause.[3] The saving clause recognizes only unprovided-for common-law crimes; it does not authorize this Court to create new crimes. If assisting a suicide is a common-law crime and not murder under the common-law definition incorporated in our murder statutes, it may be penalized as another crime under the saving clause. The Court, however, cannot simply exclude from the common-law definition of murder that which is murder under our statutes and then hold that the Legislature intended in the saving clause to authorize the Court to say that that which was murder at the common law is now a new crime.

Finally, I disagree with the conclusion that one who provides the means for suicides and participates in the acts leading up to death may not be charged with murder as long as the final act is that of the decedent. In stating this conclusion, the lead opinion has parsed the definition of participation to permit involvement that is dangerously overinclusive. Absent standards established to distinguish between those who are in fact terminally ill or suffering in agony and rationally wish to die and those who are not, there is no principled vehicle in the judicial arsenal to protect against abuse, save the jury's evaluation of a given defendant's conduct. The acts shown in the Oakland County case establish causation as a matter of law for purposes of bindover. Thus, the trial court erred in quashing the information, and the decision of the Court of

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[3]MCL 750.505; MSA 28.773.

Appeals should he affirmed.

I

Criminal homicide has been a statutory offense in Michigan since 1846. The crime is not defined by reference to its elements but by reference to the common law. People v Schmitt, 275 Mich 575, 577; 267 NW 741 (1936). There is no dispute that at the time these offenses were committed, the Legislature had shown no disposition to depart from the common-law definition of murder as including assisted suicide. The lead opinion today would alter the definition of murder by changing the causation requirement in the context of suicide to exclude from liability for criminal homicide those who intentionally participate in the events that directly cause death with the intention that death occur.

However, the intended results of the plaintiff's acts were the results actually obtained, and the acts were both the cause in fact and the proximate or foreseeable cause of the decedents' deaths. The lead opinion would thus redefine murder as it is defined in our statutes and has created a special causation standard, unknown in any other jurisdiction.

The detailed account of the preliminary examination testimony describing the assisted suicides of Ms. Miller and Ms. Wantz, slip op at 44-47, belies the notion that the degree of participation by the defendant in these events was insufficient to permit a charge of murder even in those states that have adopted separate penalties for soliciting or assisting suicide. Testimony at the preliminary examination presented evidence that the defendant, *inter alia*, inserted IV needles into Ms. Wantz's arm, tied strings to her fingers so she could release chemicals into her bloodstream, and placed a mask over Ms. Miller's face so that she could breath carbon monoxide gas. *Id.* at 45-47. The mask was

secured so tightly that without intervention that fact alone would have caused death. It cannot be said, as a matter of law, that these actions did not establish probable cause to believe that the defendant committed murder.

The decedents' alleged desire in the present case that they die with the defendant's assistance does not absolve the defendant of criminal liability. People v Potter, 5 Mich 1, 5 (1858). The request by the decedents does not provide justification or excuse. *E.g.*, State v Cobb, 229 kan 522; 625 P2d 1133 (1981); State v Fuller, 203 Neb 233; 278 NW2d 756 (1979); anno: *Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide*, 40 ALR4th 702, § 5, pp 709-710. The magistrate's decision to bind over the defendant for trial should be upheld.

II

The lead opinion invites the circuit court on remand to draw a distinction between acts of participation that are merely "the events leading up to" the deaths of the decedents and "the final overt act that causes death" that, as a matter of law, will constitute probable cause for the charge of murder. Such a "test" transfers the responsibility for the outcome from the shoulders of this Court to the trial court and effectively converts every criminal homicide accomplished by participation into assisting suicide.

It could be argued that this solution does no more than what the assisted suicide law does. But the assisted suicide law is still only a temporary measure, and the Legislature has never indicated that it would not follow the model of other states and continue to apply the law of criminal homicide despite the existence of statutes specifically directed to suicide.

The lead opinion's "solution" is in fact an invitation to continue participation until the level of participation

assumes a level of proof for bindover suggesting that the defendant intended to kill a decedent for impure reasons. In pragmatic terms, the force of the law is to discourage conduct on the margins. What the lead opinion would do in setting new margins is permit a new range of activity and thus increase the potential for abuse of the vulnerable by the active participant.

As the Canadian Supreme Court recently and aptly observed in upholding a blanket prohibition against assisted suicide:

> The basis for this refusal is twofold it seems -- first, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and secondly, there is no certainty that abuses can be prevented by anything less than a complete prohibition. [Rodriguez v British Columbia, 107 DLR 4th 342; 1993 Lexis/Canada 51 (1993).]

A

People v Roberts, 211 Mich 187; 178 NW 690 (1920), correctly held that the homicide statute had incorporated the common-law definition of assisted suicide as murder. The question presented is whether we have the authority to modify that definition and, granting that we have the power to do so, whether we should. People v Couch, 436 Mich 414; 461 NW2d 683 (1990). The latter question involves the issue whether the judiciary can devise an acceptable formula advancing the autonomy of those who deem their lives not worthy to be lived, without jeopardizing the lives of those whose further existence society might deem not worthy of protection. That the Court is unable to do so is illustrated by today's decision that alters the law of causation in all suicide settings, not just those of the terminally ill or acutely suffering.

As Justice Jackson observed in a famous dissent, a judicial decision has a force all its own. "The principle then lies about like a loaded weapon . . . . Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes." Korematsu v United States, 323 US 214, 246; 65 S Ct 193; 89 L Ed 194 (1944).

The fact that an active participant in the death of another risks jury determination that the circumstances are not so compelling as to benefit from their mercy-dispensing power tests the situation and the actions by the only repository of authority within the judicial reach. Whether death has been caused for good, bad, or mixed reasons, or whether the person is in fact presently incurable or suffering intolerable and unmanageable pain, and has a fixed and rational desire to die, are issues that should be addressed by a jury or the Legislature, not by this Court as a matter of law.

Today the Court purports to approve only a mild deviation from the common law by moving the line of protection the murder statute affords from participation to pulling the trigger. But the law that condemns such killings as murder has a substantially greater deterrent effect, imposing a substantially greater responsibility on those who would violate it than the penalty for assisted suicide.

While the Court's redefinition of causation is presumably correctable, the lead opinion would reduce the deterrent potential without any assurance that the line it draws will not marginally increase the risk of death for those who would have a reason to live had society and the participant in their demise valued their continued existence.

The lead opinion recognizes that the state's interest in guarding against potential abuses does not require it to stand neutral. The state's interest in protecting the lives of

those who wish to live under any circumstances also justifies the most severe sanction for those who would cause such deaths. The lead opinion nonetheless sends the message that it assesses the quality of particular human life and judges as a matter of law that it is less culpable to destroy some lives than others.[4] In a society that draws a line that dictates that it is better that many go free than that one innocent person should be convicted, something approaching the principles protecting against error that are extended to the criminally accused should be extended to the victims of those who are willing to participate in suicide and to cause death, as long as they do not pull the final trigger. Kamisar, *Some non-religious views against proposed "mercy-killing" legislation*, 42 Minn L R 969, 1041 (1958).

The lead opinion's distrust of the jury and its dislike for the severity of the punishment imposed by the law of criminal homicide has caused it to draw a line that crosses a dangerous threshold. The risk of irreversible mistake, however "minimal," should not be borne by those no longer able to protest-it should rest on those who assume the authority and wisdom to extinguish human life.

B

To the extent that this Court reduces culpability for those who actively participate in acts that produce death, we do so at the risk of the most vulnerable members of our society-the elderly, the ill, the chronically depressed, those suffering from a panoply of stressful situations: adolescence, loss of employment, the death of a child or spouse, divorce, alcoholism, the abuse of other

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[4]The line drawn today is a far less merciful one than recognizing that there is much that could and should be done for those who are truly suffering, or who, for a variety of reasons, have come to see themselves as irrelevant in this brave new world.

mind-altering substances, and the burden of social stigmatization.

The lead opinion's solution assumes the actor is a sufficient buffer between the patient and the family, that the actor knows enough about the disease to assure its terminal course and enough about the sanity of the deceased to evaluate the rationality of suicide. The lead opinion thus ignores the distinction between a voluntary act carried out if the victim is sane, and the inquiry into whether the victim's mental state is compromised by disease, depression, or medication.

C

The Model Penal Code recognizes the inherent difficulty of objective management of an assisted suicide law to separate proper from improper motivations of a participant. The code classifies purposely causing, that is, engaging in conduct "but for which the result in question would not have occurred," Model Penal Code, § 210.5, comment 4, p 98, suicide by force, duress, or deception as criminal homicide. Aiding or assisting another to commit suicide is a felony at the level of manslaughter if the defendant's conduct causes, that is, was a "significantly contributing factor" to a suicide or attempted suicide. *Id.*, comment 5, p 103. The same distinctions are drawn in statutory schemes. States that have enacted assisted suicide statutes continue to permit prosecutions for criminal homicides out of recognition that underinclusive line drawing by the judiciary may, as here, permit dangerously overinclusive activity.

In fact, as the excerpts from the cases cited by the lead opinion indicate, it has not aligned itself with other states. Thus, in People v Cleaves, 229 Cal App 3d 367, 375; 280 Cal Rptr 146 (1991), the court found that a defendant who held the decedent's back so the decedent could strangle

himself was not merely a passive participant in a suicide, stating that the murder statute applies "where a person actively assists in performing the overt act resulting in death . . . . " Likewise, State v Sexson, 117 NM 113; 869 P2d 301 (NM App, 1994), does not support the lead opinion's revisionist view of causation. In Sexson, the court found that defendant could be charged with murder on evidence that he merely held a gun in place because "[t]hat action transcends merely providing the Victim a means to kill herself and becomes active participation in the death of another." *Id.*, 869 P2d 305.

The factual setting and issue decided in In re Joseph G , 34 Cal 3d 429; 194 Cal Rptr 163; 667 P2d 1176; 40 ALR4th 690 (1983), are markedly dissimilar from those in the present case. Unlike defendant Kevorkian, who was not a party to any similar agreement, but rather an aider in accomplishing the deaths of two other persons, the defendant in Joseph G was a participant in a mutual suicide pact, intending at the time of his actions to kill both himself and his partner.[5]

In finding that a defendant who simultaneously undertook completion of the agreed to suicides with his deceased partner by a single instrumentality could only be found guilty of assisting suicide, and not murder, the California court "decline[d] to ritualistically apply the active/passive distinction" between murder and suicide assistance employed by earlier precedent to the unique facts before it. *Id.* at 440.

The Joseph G court did analyze precedent regarding

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[5]In addition, the court in Joseph G was concerned with the interpretation of a statutory proscription against assisting suicide, rather than the propriety of charging common-law murder as is present in the instant case.

the distinction between murder and the statutory crime of assisting suicide, but did not hold, as the lead opinion suggests, that a charge of murder against a suicide assistor is unavailable unless the assistor participated in the final overt act. Instead, the court concluded that "the key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide. If the defendant merely furnishes the means, he is guilty of aiding a suicide; if he actively participates in the death of the suicide victim, he is guilty of murder." *id.* at 436. The court made no clear distinction between where such passive assistance ends and active participation begins.[6]

Although these distinctions are irrelevant in this context because we did not have an assisted suicide statute at the time of the deaths of Ms. Wantz and Ms. Miller, the referenced discussion establishes that, in these states, participation in the overt acts causing death is chargeable as murder. Thus, the cases cited do not support the lead opinion's conclusion that if the defendant did not participate "in the act that . . . directly cause[s] death," slip op at 57, n 69, he cannot be bound over on a charge of

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[6]We do not reach the question whether People v Roberts, *supra*, should be reconsidered insofar as it might apply to one who is absent when the means furnished is consumed by the deceased. Roberts is factually dissimilar from the instant cases. The question whether the acts in this case constituted a common-law crime not incorporated by our criminal statutes is likewise not before us. We note, however, that the Court in Roberts did not find it necessary to determine if suicide was a crime (although unpunishable) in Michigan. The Court's exclusive reliance on Blackburn v State, 23 Ohio 146 (1872), may have obscured the fact that, unlike the Michigan statutory scheme, the Ohio statutes did not contain a saving clause. See State v Carney, 69 NJL 478, 480; 55 A 44 (1903). The Roberts definition of murder correctly states the common law embodied in our homicide statutes.

murder[7]. Sexson did not pull the trigger, he held up the gun, and Cleaves did not strangle the decedent, he assisted the decedent in completing the act. Likewise, defendant Kevorkian did not pull the trigger for Ms. Miller, but he assisted Ms. Miller in completing the act. In Ms. Wantz's case, his involvement was even more direct. Defendant inserted the needle and Ms. Wantz sedated herself. When her hand dropped involuntarily, the trigger was pulled and the needle inserted by defendant was activated carrying potassium chloride in sufficient quantities to cause death.

III

Finally, the lead opinion finds that one who has only participated in a suicide but has not done the final act causing death may be prosecuted under the saving clause. MCL 750.505; MSA 28.773. The statute is applicable only when two conditions obtain: the conduct is not otherwise punishable by statute and the conduct was indictable at common law. However, at common law, one who does the deed, even through an innocent agent, is a principle in the first degree. Perkins & Boyce, Criminal Law (3d ed), p 737. If suicide is not criminal,[8] the lead opinion has attempted by judicial fiat to create a new crime of assisting suicide. Culpability for persons assisting in suicide at

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[7]The lead opinion is willing, slip op, p 58, n 70, to recognize that one who negligently furnishes the means by which another commits suicide could be found guilty of manslaughter. Thus, one who is only criminally careless and does not participate at all may be found guilty of a fifteen-year felony, while one who is present and participates in the events leading up to the act that directly caused death with the intent to cause death can only be charged with assisted suicide, punishable by a maximum penalty of five years. Moreover, since an act of suicide is innocent, it would follow that one who attempts and fails but kills others in the process may not be charged with any offense.

[8]Slip op at 58, n 71.

common law was based on participation as parties to the crime of suicide.[9] The saving clause furnishes no basis for the Court's creation of a new crime. The usurpation of legislative authority in the lead opinion's approach is evident if one considers the reach of its rationale. The lead opinion suggests an ability to exclude certain factual settings from the reach of the homicide statutes and then, as it were, find legislative authorization of a free-standing authority to recognize newly evolving crimes punishable under the saving clause. If such conduct were permissible, the Court could simply reorder the punishment for any felony by concluding that conduct falls outside a given statute but within the saving clause. Contrary to the lead opinion's conclusion, the saving clause is not a delegation of legislative authority to this Court to create new crimes. The Legislature intended to save only what had not otherwise been covered in 1846.

Conclusion

The lead opinion would hold that where one "only" plans and participates in a death the actor can claim was "suicide," he may not be charged as a matter of law with criminal homicide. No jurisdiction in the history of this country has so held and for obvious reasons. We have no way of assuring that redefining the line that constitutes causation will distinguish between terminally ill or desperately suffering people and those who think they are, no way of deciding in advance that the act of suicide is that of a rational person who chose death with dignity or that of a severely depressed person who would not have chosen death had help been available. Most significantly, the lead opinion's unwillingness to allow a jury to dispense mercy by

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[9]See, generally, *id.* at 735-751 (describing the common-law distinctions between principals and accessories), pp 756-757, (applying the distinctions in suicide cases).

determining the degree of culpability for a result clearly intended and caused in fact by a defendant is a sea change in the fundamental value we have assigned to the preservation of human life as one of the last great faiths that unites us.

The question whether the definition of murder should be changed so as to exclude one who participates in all events leading up to the death, save for the final act, is a matter of compelling public interest, demanding a balancing of legitimate interests that this Court is institutionally unsuited to perform. Although the Legislature passed a temporary assisted suicide law that included participation, it has not indicated that it intends to redefine murder, and every jurisdiction that has adopted a specific law covering assisted suicide has permitted prosecution for murder where the participation goes "too far." No issue is more deserving of continued legislative debate and public study regarding whether, when, and how persons can maximize personal autonomy without running the risk of creating a societal quicksand for irreversible error.

The decision to stay our hand in this matter is not simply a matter of adhering to the rule of law.[10] It reflects the wisdom in recognizing that if we choose not to intervene, we have left the pressure for change in this rapidly developing and exceedingly complex field in the forum where it is best addressed. To choose to intervene is to remove the pressure to decide that assisting suicide can be found by a jury to be murder, and to add the Court's imprimatur to the voices of those who argue for an

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[10]Const 1963, art 3, § 7. "The common law and the statute law now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

expansive right to self-determination that would decriminalize assisted suicide.

As Professor Tribe observed in the context of constitutional principles regarding these issues:

> [T]he judiciary's silence regarding such constitutional principles probably reflects a concern that, once recognized, rights to die might be uncontainable and might prove susceptible to grave abuse, more than it suggests that courts cannot be persuaded that self-determination and personhood may include a right to dictate the circumstances under which life is to be ended. In any event, whatever the reason for the absence in the courts of expansive notions about self--determination, the resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting people, may endanger personhood. [Tribe, American Constitutional Law (2d ed), pp 1370-1371.]

The profound questions that must be debated and the regulatory decisions that must be made are uniquely suited for legislative resolution. There is no principled method by which the Court can amend the common-law definition of murder, included in the statutes of this state. People v Utter, 217 Mich 74, 86; 185 NW 830 (1921).

> [I]t is proper, in fact the oath we took requires nothing less, to rely on the Legislature to devise, should it choose to do so, a means to avoid the harsh penalty that is imposed when assisting a suicide is treated as murder pursuant to a literal

application of MCL 750.316; MSA 28.548. [People v Kevorkian No 1, 205 Mich App 180, 191; 517 NW2d 293 (1994).]

LEVIN, J. (concurring in part and dissenting in part)

I agree with the lead opinion that § 7 of 1993 PA 3,[1] enacting that a person, who provide the "physical means" or "participates in a physical act" by which another person attempts or commits suicide, is guilty of criminal assistance to suicide,[2] does not violate the Title-Object Clause of the

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[1]MCL 752.1021 *et seq.*; MSA 28.547(121) *et seq.*

[2](1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both:

(a) Provides the physical means by which the other person attempts or commits suicide.

(b) Participates in a physical act by which the other person attempts or commits suicide.

(2) Subsection (1) shall not apply to withholding or withdrawing medical treatment.

(3) Subsection (1) does not apply to prescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.

(4) This section shall take effect February 25, 1993.

(5) This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4 [MCL 752 1027: MSA 28.547(127).]

Michigan Constitution.[3]

I further agree with the lead opinion that the common-law offense of murder should be redefined to preclude conviction for murder on evidence that the accused was merely involved in the events leading up to the death, such as providing the means, and that in such a case the proper charge is assisted suicide under the saving clause of the Penal Code providing that it is a five-year felony to commit a common-law offense for which no provision is made by statute.[4]

I also agree that § 7 of act 3 does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution[5] insofar as it bars assisting suicide by a physically healthy but mentally disturbed or

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[3]The Michigan Constitution provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. [Const 1963, art 4, § 24.]

[4] Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court. [MCL 750.505; MSA 28.773.]

[5]The Fourteenth Amendment provides in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

incompetent person.[6]

I would hold, however, that § 7 of act 3 violates the Due Process Clause insofar as it bars a competent, terminally ill person facing imminent, agonizing death from obtaining medical assistance to commit suicide.

I would accordingly direct, in the three criminal cases (numbers 99591, 99674, and 99759), that if the circuit court determines on remand that the evidence produced at the preliminary examinations shows that the persons who committed suicide were competent, terminally ill, facing an imminent, agonizing death, the motion to quash should be granted with regard to assisted suicide as well as murder, and, if the preliminary examination records are inadequate for that purpose, the matters should be remanded by the circuit court for a further preliminary examination to determine whether the persons who committed suicide were competent, terminally ill, and facing an imminent, agonizing death.

I

1993 PA 3 does not violate the Title-Object Clause of the Michigan Constitution because

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[6]The memorandum opinion states:

> 2) The United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide. (Cavanagh, C.J., and Brickley, Boyle, Riley, and Griffin, JJ.)

I join in that statement insofar as such penalties are imposed on one who assists a physically healthy but mentally disturbed or incompetent person to commit suicide, but do not join insofar as such penalties are imposed for providing medical assistance to commit suicide to a competent, terminally ill person facing an imminent agonizing death.

- Act 3 embraces but one object, namely, issues related to death and dying, including assistance of suicide, and
- Act 3, in contrast with 1992 PA 270, was not altered or amended on its passage through either house.

II

Dr. Kevorkian is not a murderer. The evidence in the instant People v Kevorkian cases, in contrast with the record in People v Roberts, 211 Mich 187; 178 NW 690 (1920), which depended substantially on the possibly self-serving testimony of the defendant, who had pleaded guilty, establishes that Dr. Kevorkian did no more than provide the physical means by which the decedents took their own lives. That evidence establishes no more than criminal assistance of suicide or a common-law assisted suicide offense for which no provision is made by statute.[7]

I agree with the lead opinion that Roberts should be overruled insofar as it can be read as holding that a person who does no more than assist another in committing suicide has acted with the requisite malice to establish that element of the crime of murder.[8]

Because the evidence adduced in the murder prosecutions showed no more than criminal assistance to suicide or such a common-law assisted suicide offense, I see no need for a remand to determine whether Dr. Kevorkian should be bound over on a charge of murder. I

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[7]See n 5 and accompanying text, and the lead opinion, slip op, p 58.

[8]A person who purposely causes another to commit suicide by force, duress or deception may be prosecuted for murder. See ALA, Model Penal Code, § 210.5(1) pp 91 *et seq.*

join in part VI of the lead opinion to join in overruling Roberts to the extent that it can be read to support the view that the common-law definition of murder encompasses intentionally providing the means by which a person commits suicide.[9]

III

The Attorney General and the prosecutors contend that in no circumstance does a person have a liberty interest under the Due Process Clause in obtaining medical assistance to commit suicide. Dr. Kevorkian contends that any terminally ill person has such a liberty interest. I do not agree with either of those absolute positions.

I have signed the opinion of a colleague[10] that would recognize a right in some circumstances to physician-assisted suicide because I agree with him that a person who is terminally ill may have a liberty interest in obtaining a physician's assistance to commit suicide, and that § 7 of act 3 may be violative of the Due Process Clause as applied to a particular terminally ill person.

Absent legislation providing a means, with legislatively prescribed safeguards, by which a terminally ill person may obtain such medical assistance, I would hold that a terminally ill person may apply to the circuit court for an order declaring entitlement to seek medical assistance, and that § 7 of act 3 is violative of the Due Process Clause as applied to that person.

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[9]Slip op, p 57.

[10]See opinion of Mallett, J., concurring in part and dissenting in part.

The developing law[11] concerning the withholding of medical treatment[12] would assist a circuit judge in deciding whether it is appropriate under all the circumstances to conclude that the person is entitled to seek medical assistance to commit suicide. Such a case should, of course, be expedited, and preliminary phases of such litigation could precede the time when the terminally ill person actually faces imminent, agonizing death.

The record in Hobbins v Attorney General does not establish that the persons alleging terminal illness in that litigation have now reached the threshold where it would be appropriate to conclude that they are entitled to seek medical assistance to commit suicide, nor do they claim that they have an immediate desire to do so. They should be allowed to commence an action at any time to establish a record so that if and when they approach the threshold where it is appropriate to conclude that they are entitled to medical assistance to commit suicide, the preliminary phases of such litigation will have been concluded and the circuit court can, on a proper showing, expeditiously enter an order providing the relief that they seek so that they can die, if they choose, less conclusively, less painfully, and with as much dignity as may be possible.

IV

I turn to the meritorious question, whether § 7 of act 3 violates the Due Process Clause.

The lead opinion states that "the threshold question in

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[11]Guidelines for State Court Decision Making In Life-Sustaining Medical Treatment, National Center for State Courts (2d ed) (1992).

[12]See subsection 2 of § 7 of act 3, n 2 *supra*, which provides that subsection 1 of § 7 of act 3 "shall not apply to withholding or withdrawing medical treatment."

this case is whether the [Due Process C]lause encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance."[13]

By framing the question in this manner, the lead opinion foreordains the answer.

There is a long history of laws prohibiting suicide. The state has the power, indeed the obligation, to protect life. But laws prohibiting suicide and assisted suicide evolved to address situations different from those here at issue. Those laws assume that persons seeking to terminate their lives are emotionally disturbed or mentally ill. This is so in the vast majority of cases.

The real issue is not whether the state can generally prohibit suicide. The real issue is whether the state may deny a competent, terminally ill person, facing imminent, agonizing death, medical assistance to commit suicide.

I agree with the lead opinion that assisted suicide can be distinguished from other conduct protected by the Due Process Clause, such as abortion and the withdrawal of life-sustaining medical treatment. The absence of controlling precedent precisely addressing the issue does

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[13]Slip op, p 22.

The lead opinion similarly states:

> All of the theories, of course, assume a fundamental liberty interest in suicide itself. [Slip op, pp 27-28.]

The lead opinion reasons in an accompanying footnote:

> An attempt to find a liberty interest in assisted suicide independent of a liberty interest in suicide itself cannot succeed. If the Due Process Clause does not encompass a fundamental right to end one's life, it cannot encompass a right to assistance in ending one's life. [Slip op, p 28, n 35.]

See also second paragraph of n 47 on page 37.

not, however, end the inquiry, as the lead opinion presupposes when it states, "[w]e disagree . . . that either Cruzan or Casey *preordains* that the Supreme Court would find that any persons, including the terminally ill, have a liberty interest in suicide that is protected by the Fourteenth Amendment."[14] (Emphasis added.)

If the issue were preordained, these cases would not be so troubling. The real issue facing the Court is not whether suicide or assisting suicide can be proscribed by law, but whether the Due Process Clause bars a state from depriving a competent, terminally ill person, facing imminent death, and increasing agony, from obtaining medical assistance to avoid suffering such a bitter end of life.

The lead opinion distinguishes at length the instant cases from Cruzan v Director, Missouri Dep't of Health, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), and Planned Parenthood of Southeastern Pennsylvania v Casey, ___ US ___; 112 S Ct 2791; 120 L Ed 2d 674 (1992), and stresses the obvious: there is a long history of laws outlawing suicide.

Abortion and withdrawal of life-sustaining measures are indeed different from assisted suicide. Nevertheless, a reasoned application of the principles stated in Casey and Cruzan persuades me that state law restrictions on a person's ability to end his life implicates the interest in personal liberty. Whether a competent, terminally ill person has a right to medical assistance to commit suicide cannot be decided without balancing the state's interest against the person's interest. I conclude that the United States Supreme Court, as presently composed, if constrained to decide the question, would hold that the

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[14]Slip op, p 30.

person's interest outweighs the state's interest when the person is competent, terminally ill and facing an imminent and agonizing death.

I thus so conclude, not from any explicit command of precedent, but by applying the approach suggested by the United States Supreme Court in Casey, "reasoned judgment"[15] to the imperfect analogies of Casey and Cruzan.[16]

V

The lead opinion dismisses Casey, arguing that it was decided on the basis of *stare decisis*, rather than the merits, and that abortion is *sui generis*. Casey, however, reaffirmed the doctrinal support for earlier abortion rights decisions of the United States Supreme Court, stating:

> [T]he reservations any of us may have in reaffirming the central holding of Roe are *outweighed by the explication of individual liberty* we

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[15]Casey, *supra*, 112 S Ct 2806, opinion of O'Connor, Kennedy, and Souter.

[16]In Cruzan, the Court said:

> Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition. [497 US 279.]

have given combined with the force of *stare decisis*." [*Id.*, 112 S Ct 2808 (emphasis added).]

The Casey plurality clarified the analytic method for deciding substantive due process issues, and said:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: *reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.* That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. [*Id.*, 112 S Ct 2806 (opinion of O'Connor, Kennedy, and Souter, JJ).] (Emphasis added.)

Although the lead opinion would limit the inquiry solely to historical practices and precedent, Casey calls on us to engage in a more thoughtful, less formulaic approach.[17]

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[17]The Casey plurality reaffirmed the following view of the Due Process Clause:

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. n [Id., 112 S Ct 2806 (quoting Poe v Ullman, 367 US 497, 542; 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Harlan, J. dissenting from dismissal on jurisdictional grounds).]

VI

Another line of cases, beginning with In re Quinlan, 70 NJ 10; 355 A2d 647 (1976), and, more recently Cruzan, *supra*, addresses the question whether life-sustaining medical treatment may be withdrawn from an incompetent person. Cruzan said that recognition of a right to refuse life-sustaining support was implicit in the Court's earlier decisions construing the Due Process Clause. The Court on that basis assumed that "the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 279.[18]

The Court said that competing interests were involved, especially where, as in Cruzan,[19] the life of an incompetent person was involved.[20] The Court ruled in conclusion that a Missouri statute requiring that there be clear and convincing evidence of the incompetent person's intent before authorizing the withdrawal of life-sustaining treatment struck a constitutionally permissible balance between the competing interests.[21]

The lead opinion contends that withdrawal of life support can be distinguished from assisted suicide. I generally agree.

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[18]As the lead opinion observes, the United States Supreme Court premised this right on the right to refuse medical treatment. Slip op, p 24, n 29. This right was derived as a corollary to the common-law notion of informed consent. Cruzan, *supra* at 269-272. In addition, this right was framed in terms of a protected "liberty" interest, rather than under the right to privacy. *Id.* at 279, n 7.

[19]And in Quinlan.

[20]*Id.* at 280-281.

[21]*Id.* at 283.

A rule allowing a person to have his respirator disconnected, but to take no other steps to end his life, condemns him to choke to death on his own sputum. Similarly, if the law bars a person who can only take nourishment through a feeding tube from taking steps in addition to ordering the tube removed to end his life, he is required to suffer death by starvation and dehydration. Barring such persons from taking other steps to end their lives would, I think, constitute an undue burden on the right implicitly recognized in Cruzan.[22] Cruzan should not be read as limiting a person to a half step when that would result in greater suffering.

The legitimate concerns about involuntary euthanasia apply with at least as much force to the withdrawal of life support where the person is incompetent, yet the United States Supreme Court in Cruzan held that a state statute permitting the withdrawal of life support on proof of the incompetent's wishes by clear and convincing evidence was consistent with due process.

VII

The Casey plurality resolved the conflict between the state's interest in the life of the fetus and the woman's interest in bodily integrity and self-determination by drawing a line at fetal viability.[23] Before viability, the state may not place an "undue burden" on the woman's right to an abortion.[24]

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[22]See part VII.

[23]*Id.*, 112 S Ct 2817.

[24]*Id.*, 112 S Ct 2820.

The plurality stated that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking

In Cruzan, the Court struck a balance between the state's interest in life and preventing euthanasia, and the incompetent person's interest in being free of unwelcome bodily intrusions. The Court found that a "clear and convincing" evidentiary standard provided a permissible balance of the competing interests.[25]

In the suicide context, legitimate state interests generally outweigh a person's interest in ending his life. The vast majority of suicides are "irrational" efforts by the depressed or mentally disturbed. Society can reasonably assume that a person's mental problems have clouded his perception. Where an otherwise healthy person is depressed or mentally disturbed, the personal liberty interest is weak, and the state has a strong interest in protecting the person's interests in life.

In contrast, where the person involved is competent, terminally ill, and facing imminent, agonizing death, the interest of the state in preserving life is weak, and the interest of the terminally ill person in ending suffering is strong.

The state asserts two interests.[26] First, the state's

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an abortion of a nonviable fetus." *Id.*, 112 S Ct 2820.

[25]*Id.* at 283.

[26]The state and amici assert other interests, such as preserving the integrity of the medical profession and protecting friends and family of the suicide from emotional harm as balancing against the liberty interest recognized here. Whether these interests weigh in favor or against permitting a terminally ill person to end his own life depends on the particular circumstances of a given case. It is by no means clear that these interests would always be in opposition to the terminally ill person's liberty interest.

general interest in preserving life.[27] In most situations where a person might seek to commit suicide, the person, even if handicapped or emotionally disturbed, has years of life remaining for the state to protect. That possibility has been largely foreclosed for a terminally ill person. The choice that remains is not between life and death, but over the terms of death.

The principal argument against assisted suicide is the second interest asserted by the state: assuring that persons who desire to live are not coerced into committing suicide. While this is clearly a concern of great importance, adequate procedures can and have been developed to assure that a terminally ill person's choice to end life is not coerced.[28]

Restrictions on medical assistance to commit suicide for the terminally ill should be evaluated according to the undue burden standard enunciated in Casey.[29] The undue burden standard permits the state to regulate the process of medically assisted suicide to assure that the person truly (a) is terminally ill, (b) is competent, (c) is suffering agonizing pain, (d) faces imminent death, (e) desires to commit suicide, and (f) needs or desires help to do so.

The lead opinion contends that "[n]o clear definition of 'terminal illness' is medically or legally possible, since

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[27]It has been said that it is questionable why such an interest is legitimate, "completely abstracted from the interest of the person living that life . . . . " Cruzan, *supra* at 313. (Brennan, J., dissenting). But the Cruzan majority decided that government "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . . " *Id.* at 282.

[28]See n 10.

[29]See Casey, 112 S Ct 2820.

only in hindsight is it known with certainty when someone is going to die."[30]

There is to be sure difficulty in defining "terminal illness." That does not justify avoiding the issue.[31]

With appropriate regulation and safeguards, the state may account for the differences in medical opinion in determining whether a competent, terminally ill person faces an imminent agonizing death.

MALLETT, J. (concurring in part and dissenting in part)

Because the lead opinion would find that there is no constitutional right, in any situation, to hasten one's death through physician-prescribed medications, I dissent. I agree with part IV of the lead opinion that the assisted suicide act does not violate the Title-Object Clause of the Michigan Constitution. I also agree with part VI of the lead opinion's finding, modifying the common-law definition of murder and recognizing assisting suicide as a common-law offense, and further agree that if the required elements of assisting suicide are presented to an examining magistrate under the saving clause, MCL 750.505; MSA 28.773, the defendant shall be bound over for criminal

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[30]Slip op, p 28, n 34.

[31]As stated in Casey:

> Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, . . . but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. [*Id.*, 112 S Ct 2817.]

prosecution. I recognize that under part VI, the defendant in this case may possibly be prosecuted for murder. Confronted with the record presented to this Court, I would find it hard to believe that an examining magistrate could determine that the defendant here was more than merely involved in the events leading up to the commission of the final overt act and thus chargeable or prosecutable for any crime other than assisting suicide. Central to the lead opinion's position are the statements made and the legal conclusions reached in part V. The following pages contain the reasons for my dissent.

There are strong arguments based on moral principles on both sides of this issue, and this Court should be wary of accepting arguments based solely on moral principles. As the United States Supreme Court stated in Planned Parenthood of Southeastern Pennsylvania v Casey, ___ US ___, ___; 112 S Ct 2791, 2806; 120 L Ed 2d 679 (1992), "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." Defining liberty, therefore, cannot involve a morality play by any group or by a general disapproval by the majority of this Court. The liberty to end one's suffering during a terminal illness exists as shown by the decisions in Cruzan v Director, Missouri Dep't of Health, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), In re Quinlan, 70 NJ 10; 355 A2d 647 (1976), cert den sub nom Garger v New Jersey, 429 US 922 (1976), and Compassion in Dying v Washington, 840 F Supp 1454 (WD Wash, 1994). It exists without the approval of a significant constituency and is no less deserving of recognition than is abortion. Furthermore, I agree with the court in Compassion in Dying, that, in some respects, the right to physician-assisted suicide may be easier to recognize because there is no competing life interest assertable by the state.

I. The Fourteenth Amendment

The rights conferred under the substantive portion of the Due Process Clause have been developing for over one hundred years. Mugler v Kansas, 123 US 623, 8 S Ct 273; 31 L Ed 205 (1887). As pointed out in Planned Parenthood v Casey, 112 S Ct 2804, the Due Process Clause contains "a substantive component as well, on 'barring certain government actions regardless of the fairness of the procedures used to implement them,'" quoting Daniels v Williams, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986).[1]

The constitutional claim presented here falls squarely within the Due Process Clause of the Fourteenth Amendment that maintains that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." As in the abortion cases, the governing word in this case is "liberty."

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[1]In Griswold v Connecticut, 381 US 479, 500-501; 85 S Ct 1678; 14 L Ed 2d 510 (1965), in concurrence, Justice Harlan outlined the criteria for reviewing constitution claims brought pursuant to the Due Process Clause stating that

> the proper constitutional inquiry in this case is whether [the] statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," . . . .
>
> While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. [Citations omitted.]
>
> * * *
>
> "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" . . . .

The joint opinion of Justices O'Connor, Kennedy, and Souter, in reaffirming a woman's right to receive an abortion, recognized that such cases are at "an intersection of two lines of decisions . . . . " Casey, 112 S Ct 2810. These cases may be viewed as either "an exemplar of Griswold liberty" or examples of "personal autonomy and bodily integrity . . . ." *id.*, 112 S Ct 2810, citing Cruzan, *supra* at 278.[2] Whether physician-assisted suicide is characterized as a liberty right or a privacy right, the proper constitutional analysis is found in Casey and the right to die cases.

The lead opinion and the various amici curiae in this case contend that liberty interests exist only where conduct is "'deeply rooted in this Nation's history and tradition'" or "implicit in the concept of order liberty' . . . ." See Bowers v Hardwick, 478 US 186, 191-192; 106 S Ct 2841; 92 L Ed 2d 140 (1986), quoting Palko v Connecticut, 302 US 319, 325-326; 58 S Ct 149: 82 L Ed 288 (1937), and Moore v East Cleveland Ohio, 431 US 494, 503; 97 S Ct 1932; 52 L

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[2]The right that should be recognized here is a privacy right as well as a liberty right. In Griswold, *supra*, the United States Supreme Court recognized that decisions of married couples concerning procreation are private in character. In Thornburgh v American College of Obstetricians & Gynecologists, 476 US 747, 777, n 5; 106 S Ct 2169; 90 L Ed 2d 779 (1986), Justice Stevens observed that "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.' "

The present case is also analogous to the family or bodily integrity cases to the extent these cases extended liberty interests to matters of public social concern. In Washington v Harper, *supra*, the Court found that an inmate has a significant liberty interest under the Due Process Clause in avoiding the unwanted administration of drugs. However, the Court found that the state's compelling interest outweighed the inmate's personal liberty interest. In Loving v Virginia, *supra*, the Court held that couples have a liberty interest to marry outside of there own race.

Ed 2d 531 (1977). They argue that because there is a common background making suicide and assisted suicide crimes, physician-assisted suicide cannot be a fundamental right. They also argue that such a right cannot be found anywhere in the constitution or its amendments. However, to recognize only fundamental rights according to such a test is unsuitable for the vast and fast-moving progressions of the modern world. Earlier laws or traditions are not the "source" of liberty or privacy interests. If this were so, our nation's Supreme Court would have been unable to recognize the rights that many of us now understand to be inherent in our very being.[3] As Justice Stevens stated in

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[3]The United States Constitution does not, nor could it, specifically spell out each right a person maintains as an individual. The application of the express constitutional principles embodied in the Bill of Rights resolves only the easiest cases. Emanating from these principles, however, are implied rights and interests that are no less important to individual liberties than those specifically provided in the Bill of Rights. Griswold v Connecticut, n 1 *supra*. These rights lie within the parameters of the Bill of Rights, applicable to the states through the Fourteenth Amendment.

Under the First Amendment, these unarticulated rights include the freedom to associate and privacy in one's associations, NAACP v Alabama ex rel Patterson, 357 US 449, 462; 78 S Ct 1163; 2 L Ed 2d 1488 (1958); the right to educate a child in a school of the parent's choice, Pierce v Society of Sisters, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925); and the right to study the German language in a private school, Meyer v Nebraska, 262 US 390; 43 S Ct 625; 67 L Ed 1042 (1923). Tangential to the Fourth Amendment right to be free from unlawful search and seizure is a limited right to be free from the unlawful withdrawal of blood. Schmerber v California, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966). Attached to the Ninth Amendment is the historical recognition that additional rights exist outside the constitution's plain wording.

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from

Meachum v Fano, 427 US 215, 230; 96 S Ct 2532; 49 L Ed 2d 451 (1976):

> governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. [Griswold, *supra* at 488 (Goldberg, J., concurring).]

The concept that courts may construct new liberty rights pursuant to the Fourteenth Amendment is well established. Pursuant to the Fourteenth Amendment, there is a fundamental right to marry a person of another race. Loving v Virginia, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967). Married persons have the right to receive medical advice regarding contraception. Griswold v Connecticut, *supra*; Eisenstadt v Baird, 405 US 438; 92 S Ct 1029; 31 L Ed 2d 349 (1972) (extending the right to unmarried persons); Carey v Population Services International, 431 US 678; 97 S Ct 2010; 52 L Ed 2d 675 (1977) (recognizing the right to sell and distribute contraceptives).

Also pursuant to the Fourteenth Amendment is the line of cases protecting a person's right of personal autonomy and self-determination. Part of the right to personal autonomy is the right to refuse unwanted medical treatment, Washington v Harper, 494 US 210; 110 S Ct 1028; 108 L Ed 2d 178 (1990), and of course the right to receive an abortion, Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973); Casey, *supra*.

This is not an exhaustive list of the rights that lie within the penumbras of the Bill of Rights, both in terms of the cases already decided as well as those to be decided in the future. As Justice Harlan declared in dissent in Poe v Ullman, 367 US 497, 543; 81 S Ct 1752; 6 L Ed 2d 989 (1961), these matters fall all along the "rational continuum" of rights. It is a mistake to focus on whether physician-assisted suicide is a right textually demonstrable within the body of the constitution.

The individual liberty interest in ending one's suffering during terminal illness lies within the penumbras of the Ninth and Fourteenth Amendments. Furthermore, there is a privacy right emanating from the Fourteenth Amendment to seek guidance from a physician of choice so that an informed and knowledgeable decision can be made. As with the right to abortion, the right in the present case may be identified either as a privacy or liberty right.

> [N]either the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. *But it is not the source of liberty, and surely not the exclusive source.* [Emphasis added.]

Following the lead opinion's logic to its conclusion, fundamental rights would only arise if backed by a significant constituency. "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .'" Tribe, Constitutional Law (2d ed), p 1351, quoting West Virginia Bd of Ed v Barnette, 319 US 624, 638; 63 S Ct 1178; 87 L Ed 1628 (1943). Moreover, if the historical analysis test is appropriate, then the holding in Roe v Wade would be nothing more than an exception to the rule.[4]

A. The Right to Die

This Court should not demand that plaintiffs establish an historical right to self determine the quality of life that a terminally ill person must endure.

The lead opinion suggests that because the Cruzan Court merely "assumed" for the purposes of that case that

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[4]Indeed there is a great deal of historical antecedence for the proposition that abortion is a criminal offense. See Roe at 129-141 (tracing the criminal history of abortion).

a person has a constitutional right to refuse life-sustaining treatment such a right may not exist. Yet if this Court was squarely presented with that issue, it is doubtful that it would rule contrary to established precedent of this state and others.[5]

Even applying the "concept of ordered liberty" analysis espoused by the lead opinion, the right to refuse life-sustaining treatment can be recognized. In Washington v Harper, *supra*, the United States Supreme Court found that a competent person, even an inmate who suffers from psychotic episodes, has a due process liberty interest to be free from the unwanted administration of antipsychotic medications.[6] Further, in the seminal case, In re Quinlan, *supra* at 39, the New Jersey Supreme Court explicitly recognized such a right:

> We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural death.

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[5]See In re Rosebush, 195 Mich App 675; 491 NW2d 633 (1992) (allowing the parents of a minor the right to determine whether life-sustaining treatment should be withheld or withdrawn from the minor). See also In re Conroy, 98 NJ 321; 486 A2d 1209 (1985); Donaldson v Lundgren, 2 Cal App 4th 1614, 1620; 4 Cal Rptr 2d 59 (1992); In re Quinlan, *supra*; Cruzan, *supra*, 112 S Ct 2847-2848. See also anno: *Judicial power to order discontinuance of life-sustaining treatment*, 48 ALR4th 67.

[6]However, the Court ultimately held that the state's interest in preserving the orderly administration of its prisons and mental institutions outweighed the inmates right of personal autonomy. *Id.*

* * *

> We have no hesitancy in deciding . . . that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life.

Both Harper and Quinlan, establish that a competent person has a fundamental right to refuse unwanted medical treatment. But more importantly, Quinlan and its progeny establish that a person has a right to determine whether to continue suffering when faced with an inevitable death and that the state may not compel unwanted lifesaving treatment. Moreover, other jurisdictions have recognized that the state's interest in preserving life includes the duty to protect the right of a person not to die in a demeaning or degrading manner.[7] To recognize the right asserted

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[7]See Brophy v New England Sinai Hosp, 398 Mass 417, 434; 497 NE2d 626 (1986). "The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity." See also Cruzan at 310-311.

This state also protects the rights of the terminally ill to refuse life sustaining treatment as evidenced by the statutory allowance of a patient advocate to make a decision to withhold or withdraw treatment.

> A patient advocate may make a decision to withhold or withdraw treatment which would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death. [MCL 700.496 (7)(d): MSA 27.5496 (7)(d).]

here is simply a logical extension of the law.[8] As Justice O'Connor stated in Cruzan, *supra* at 289: "Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment."

B. Planned Parenthood v Casey

In Planned Parenthood v Casey, the United States Supreme Court reviewed the constitutionality of the

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[8]Recent polls show increasing support for physician-assisted suicide under certain circumstances. In August, 1993, the Journal of Family Practice reported on a survey conducted by the Harvard School of Public Health that 61 percent of all Americans would vote for an initiative legalizing physician-assisted suicide. Furthermore, 52 percent of Americans would consider such an option if it was legal and they were terminally ill and suffering from great pain.

This sentiment also has support among the medical communities of the United States and other westernized nations. A survey of 156 internists and surgeons revealed that 61 percent agreed that doctors were currently practicing euthanasia by either accelerating death or withholding treatment. See Messinger, *A gentle and easy death: From ancient Greece to beyond Cruzan toward a reasoned legal response to the societal dilemma of euthanasia*, 71 Den U L R 175, 201 (1993). Out of 354 physicians responding to a survey conducted by the Medical Journal of Australia, 107 had provided the means by which patients could hasten their deaths. However, the number was twice as high for physicians who thought the law should be changed to allow it in some circumstances. In Britain, 273 physicians responded to a similar survey, and over half would consider physician-assisted suicide in some circumstances if it were legal.

Most recently, voters in the State of Oregon approved a referendum (the Death with Dignity Act) that would allow physician-assisted suicide under carefully regulated circumstances. Physicians may prescribe suicide pills to patients with less than six months to live, but only after a second medical opinion and three requests from the patient are received. The patient must also be mentally competent and free from clinical depression.

Pennsylvania Abortion Control Act and whether its provisions constituted an undue burden on a woman's right to receive an abortion. For our purposes, the most instructive aspect of Casey was its reaffirmance of the basic tenets of Roe v Wade and a woman's fundamental right to receive an abortion.[9]

The opinion in Casey recognized that not all the substantive due process rights were identifiable at the time of the drafting of either the Bill of Rights or the Fourteenth Amendment. The framers of the constitution were also aware of this fact and understood that liberty could not be summarized in a single document, no matter how extensive. Justice Harlan's assertion in Poe v Ullman illustrates this principle best:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. *This 'liberty' is not a series of isolated points* pricked out in terms of the taking of property; the

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[9]In Casey, 112 S Ct 2804, the Court reaffirmed Roe's essential three-part holding:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

> freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. *It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . .* and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgments." [Casey, 112 S Ct 2805, quoting Poe v Ullman, 367 US 497, 543; 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Harlan, J., dissenting) (emphasis added).]

Thus, determining the existence of a liberty right involves a textual examination of the constitution, an inward examination of a jurist's beliefs, and an analysis of public inclinations.

Justice O'Connor maintained:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. . . . "*Due process has not been reduced to any formula . . . .*" [Casey, 112 S Ct 2806 (emphasis added).]

Even without a formulaic approach, reasoned judgment coupled with guidance from the following language of Casey provides some insight regarding the existence of the right asserted here:

> Our law affords constitutional protection to personal decisions relating to marriage,

> procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence*, of meaning, of the universe, and of the mystery of human life. [*Id.*, 112 S Ct 2807 (emphasis added).]

In the ordinary course of existence, some decisions remain so personal in nature that society is not in a position to make judgments about their appropriateness. It is difficult to imagine a more personal or intimate choice than determining the nature or extent of one's suffering during a terminal illness. A person's conscience, coupled with the advice of an informed and personally chosen physician, is the appropriate decision-making method.

Therefore, under the Casey "undue burden" analysis, I believe that the statute is facially invalid because it prohibits all physician-assisted suicide. As established in the right to die cases, a person has the right to determine the extent of his suffering when faced with an inevitable death. A complete ban on physician-assisted suicide represents an "undue burden" on the right of the terminally ill to end their suffering through physician-prescribed medications. As in Casey, and infringement of a fundamental right by the state that completely bars the exercise of that right cannot pass constitutional muster.[10]

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[10]In the only other case directly addressing the constitutionality of an assisted suicide law, Compassion in Dying v Washington, *supra*, the court was asked to rule on the constitutionality of the State of Washington's assisted suicide law.

Dr. Kevorkian asks this Court to find that there is a constitutional right for a suffering person to commit suicide with the assistance of a physician. However, I do not believe that people can always make competent decisions regarding their fate while suffering because too often there are circumstances in which such decisions would be later regarded as mistakes.

Plaintiffs ask this Court to recognize that a terminally ill person has a fundamental right to hasten an inevitable death. To the extent that the plaintiff asks this Court to recognize that a terminally ill person has an absolute right to make a choice to hasten an inevitable death, I believe this swings the pendulum too far. Instead, I would conclude that a terminally ill person has such a right only if the person has made a competent decision and is

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The court stated that abortion raises even more difficult questions about competing interests than does suicide by he terminally ill. "In reproductive rights cases, there is not only the interest of the pregnant woman seeking an abortion but also the potential life interest which cannot speak for itself. By contrast, in the case of assisted suicide involving a competent person, only one life is involved and that individual can voice his or her wishes." *Id.* at 1460. Significantly, the court found that the "concept of existence" language from Casey was "almost prescriptive" of recognizing the right of an individual to commit suicide. *Id.* at 1459, citing Casey, *supra*, 112 S Ct 2807.

The court concluded:

> "[T]he suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman. Thus, consonant with the reasoning in Casey, such an intimate personal decision *falls within the realm of the liberties constitutionally protected under the Fourteenth Amendment*." [*Id.* at 1460 (emphasis added).]

suffering from great pain.[11] Because plaintiffs are in a position to meet such a requirement, the Court ought not allow the prospect of reversal by the United States Supreme Court to inhibit the analysis of the very real constitutional claims presented by the plaintiffs. Beyond this criteria, I would hold that the state may assert its interest to preserve life as well as other established interests. Therefore, because the statute completely prohibits physician-assisted suicide, I believe that it is facially invalid.

This, of course, is not to say that the state does not have a readily identifiable interest in this area. The state has a legitimate interest in the preservation of the lives of its citizenry. However, the interests are not all--encompassing interests that would allow a blanket ban on physician-assisted suicide. "The Constitution imposes on this Court the obligation to 'examine carefully . . . the extent to which [the legitimate government interests advanced] are served by the challenged regulation.'" Cruzan at 303 (Brennan, J., dissenting, quoting Moore v East Cleveland, *supra* at 499). The interest in the preservation of life that is advanced by the state in the present case is not served by preserving the life of a person who will inevitably die and is suffering intolerable pain.

II. The State's Interest

While it is arguable that each of us possesses the right to commit suicide because suicide is no longer criminally punishable, such a right, if it exists, is not absolute when a

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[11]I have signed my colleague's opinion (Levin, J., concurring in part and dissenting in part), and recognize that a person who is terminally ill and suffering from great pain and is facing an imminent death falls within the confines of the due process right I would recognize here.

third party is involved. Indeed, protecting the rights and interests of third parties underpins both our constitutional doctrine and criminal laws. Accordingly, I do not embrace the suggestion that because a person may have the right to commit suicide, he also has an unconditional constitutional right to physician-assisted suicide. Rather, the right to physician-assisted suicide must be balanced against the countervailing interests of the state and society.

There are four main interests in this area that may be asserted by the state: (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of the medical profession. In re Rosebush, 195 Mich App 675, 681; 491 NW2d 633 (1992); In re Conroy, 98 NJ 321; 486 A2d 1209 (1985); Donaldson v Lundgren, 2 Cal App 4th 1614, 1620; 4 Cal Rptr 2d 59 (1992); Cruzan at 269-271. See also anno: *Judicial power to order discontinuance of life-sustaining treatment*, 48 ALR4th 67. These authorities have uniformly maintained that a "'state's interest in the preservation of life has been held to be insufficient to outweigh the individual right where the life which would be preserved would be one in a merely vegetative state or one enduring only a prolonged process of dying . . . ." Rosebush at 681, n 2. Similarly, there does not exist a sufficiently compelling justification for the infringement of the right of a competent, terminally ill person suffering from great pain to hasten death through physician-prescribed medications.

As a person's illness progresses to the point of facing an inevitable death while suffering great pain, the state cannot put forth a sufficient rationale to completely proscribe physician-assisted suicide. In Brophy v New England Sinai Hosp, 398 Mass 417, 433; 497 NE2d 626 (1986), the Massachusetts Supreme Judicial Court balanced the state's interest in the preservation of human life against

the right of self-determination and individual autonomy. The court noted that the state's interest ordinarily involves the prolongation of human life and that that interest is "very high when 'human life [can] be saved where the affliction is curable.'" Quoting Superintendent of Belchertown State School v Saikewicz, 373 Mass 728, 742; 370 NE2d 417 (1977). However, the court further noted that this interest diminishes as the prognosis for recovery wanes. *Id.*, 398 Mass 433. Thus, when a person is suffering from a terminal disease, the state should avoid subjective judgments concerning the quality of that person's life.[12]

The state may also require that such decisions be made competently.[13] Such a requirement has been fashioned by previous courts as well. In Application of President & Directors of Georgetown College, Inc, 118 US App DC 80; 331 F2d 1000 (1964), the court denied the right of patients to refuse life-saving treatment for themselves in circumstances strongly suggesting that they lack the time or

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[12]See also Quinlan, *supra* at 41.

> We think that the State's interest . . . weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest.

Moreover, in the abortion context, "Roe v Wade was less a judgment about the relative importance of maternal liberty and fetal life, than it was a decision about who should make judgments of that sort." Tribe, Constitutional Law, *supra*, p 1352 (contending that the decision is personal to the mother, not the State). Here, it is the individual, who, in the appropriate circumstances, should make the decision to hasten death through physician-prescribed medications.

[13] [T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. [Cruzan supra at 277.]

the capacity for reflection on the matter, so that the course least likely to do irreversible harm was an insistence on proceeding with treatment.

Patients have been denied the right to refuse life-sustaining medical treatment where they did not have the capacity or an adequate opportunity to reflect on the finality of the decision. See, *e.g.*, Osgood v District of Columbia, 567 F Supp 1026 (D DC, 1983). Additionally, the Quinlan court suggested that a person in extreme shock or pain is incapable of making a truly informed decision. 70 NJ 39, citing John F Kennedy Memorial Hosp v Heston, 58 NJ 576; 279 A2d 670 (1971).

Dr. Kevorkian's actions are within the scope of the state's protected interests. To the extent that a country sanctions the assisted suicide of the suffering, it does so at the risk of harm to its most vulnerable of citizens: *e.g.*, the elderly and the clinically depressed.

Furthermore, extending the right to any suffering person making a rational decision almost begs the question. It has been widely acknowledged that most individuals who attempt suicide are suffering from depression, hopelessness, or lack of social interaction. Often such attempts are merely "cries for help." There are also socioeconomic pressures on individuals that makes them consider suicide as a means of relief. Circumstances such as grief, prejudice, oppression, or teenage stress are often the reasons cited by people attempting suicide. Marzen, *Suicide: A constitutional right?*, 24 Duq L R 1 (1985).

Therefore, the state has a right to legislate in this area. However, the state's interests diminish as death nears for a terminally ill person; the interests are no longer sufficient to outweigh an individual's right to self-determination. Such an outcome would be consistent with Compassion in

Dying, *supra*, in which the court recognized the right of mentally competent, terminally ill adults to knowingly and voluntarily hasten their deaths.

III. Conclusion

The statute at issue should be deemed facially invalid because it bans all assisted suicides. A terminally ill individual who is suffering from great pain and who has made a competent decision should have a constitutional due process right to hasten his death. Because plaintiffs are in a position to now make a choice that I believe should survive any challenge from the state, I would hold that the statute represents an undue burden on that right.

The assumption that the recognition of this right would be problematic in its administration is not an appropriate consideration when determining the existence of a fundamental right. Indeed, constitutional litigation often creates the necessity to draw abstract lines that in practice are not easily workable. Nevertheless, the recognition of fundamental rights requires choices in these areas that are not readily ascribable to any particular administrative device.

We need only look to the development of the living will as an example of guidelines in the death and dying area that work effectively and remain constitutional. Pursuant to MCL 700.496; MSA 27.5496, a competent person already has the right to document the desire to refuse lifesaving medical treatment. While such documentation provides us with the right to refuse life-sustaining treatment, our laws currently do not permit us to choose to end our suffering as we near death through physician-prescribed medications. If we were allowed such an opportunity, our own reasoned judgment would prevail in each case.

There is no adequate distinction between the right of

a terminally ill person to refuse unwanted medical treatment and the right to physician-assisted suicide. There is no sense in disallowing the competent choice to have a physician intervene to relieve intolerable suffering at the end of one's life. Furthermore, such a result conflicts with what many of us would desire when faced with severe pain and an inevitable death.

Many citizens of this state are disturbed by defendant Kevorkian's crusade and, at the same time, wish to see a resolution of the difficulties facing the terminally ill. Perhaps even more troubling is that, under this law, an individual is forbidden from consulting with a private, trusted physician about such matters. The recognition of a right to make such private decisions with a trusted physician would allow open and honest discussion with the patient of all options and consequences.

Substantive due process cases invariably address those rights that are considered so fundamental that they cannot be unduly burdened by the state. Here, it is fundamentally wrong not allow a competent, terminally ill person who is suffering from great pain opportunity to die with some dignity.

Therefore, I would hold that the plaintiffs may assert a constitutional right to physician-assisted suicide if it can be shown that they have made a competent decision and are suffering from great pain. I would further allow, consistent with Cruzan, that the state may require proof of such a competent decision by clear convincing evidence if it chooses to so legislate.

I would reverse the judgment of the Court of Appeals and allow plaintiffs to document their intent to receive physician-prescribed medications should their terminal illnesses progress to the point of great pain.

STATE OF MICHIGAN

COURT OF APPEALS

TERESA HOBBINS,
Plaintiff-Appellee/
Cross-Appellant,

v

ATTORNEY GENERAL,
Defendant-Appellant/
Cross-Appellee,

and

MICHIGAN CATHOLIC CONFERENCE,
WAYNE COUNTY PROSECUTOR,
MICHIGAN RIGHT TO LIFE, and
Certain Members of the MICHIGAN
LEGISLATURE,
Amici Curiae.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

JACK KEVORKIAN, M.D.,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

JACK KEVORKIAN, M.D,
Defendant-Appellee.

Before: Fitzgerald, P.J., and Taylor and D.E. Shelton,* JJ.

FITZGERALD, P.J.,

In these consolidated appeals, we are asked to determine the constitutionality of 1992 PA 270, as amended by 1993 PA 3[1], MCL 752.1021 *et seq.*; MSA 28.547(121) *et seq.* Specifically, in Docket No. 164963, the Attorney General appeals as of right the May 24, 1993, order of Wayne Circuit Judge Cynthia D. Stephens, which declared unconstitutional the criminal provision of the act for violating Const 1963, art 4, § 24. Judge Stephens also held that individuals have a constitutional right to commit suicide. In Docket No. 171056, the prosecution appeals as of right the December 13 and 14, 1993, orders of Wayne Circuit Judge Richard C. Kaufman, which held that a ban on assisted suicide is overbroad because, in some instances, a person has a constitutional right to commit suicide. Finding that Donald O'Keefe had a constitutional right to commit suicide, Judge Kaufman dismissed the assisting suicide charge against Dr. Kevorkian stemming from his assistance in O'Keefe's suicide. Judge Kaufman also held that the act did not violate art 4, § 24. In Docket No. 172399, the prosecution appeals as of right the January 28, 1994, order of Oakland Circuit Judge Jessica Cooper, which also declared unconstitutional the criminal provision of the act for violating art 4, § 24, and therefore dismissed assisting suicide charges against Dr. Kevorkian.

Teresa Hobbins is a terminally ill person who, along with seven health care professionals and another terminally

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*Circuit judge, sitting on the Court of Appeals by assignment.

[1]Aside from reorganizing the language in the title and making minor amendments of the language contained in § 7, 1993 PA 3 did little more than give immediate effect to 1992 PA 270.

ill person[2], sought a declaratory judgment that 1992 PA 270, as amended by 1993 PA 3, MCL 752.1027; MSA 28.547(127), is unconstitutional. Dr. Kevorkian is a physician who has been charged with assisting a suicide in violation of MCL 752.1027; MSA 28.547(127).

Ms. Hobbins and Dr. Kevorkian first contend that 1992 PA 270, as amended by 1993 PA 3, is unconstitutional for violating Const 1963, art 4, § 24, which states: "No law shall embrace more than one object, which shall be expressed in its title." The question presented is governed by a standard of review de novo. Mooahesh v Dep't of Treasury, 195 Mich App 551, 562; 492 NW2d 246 (1992).

The object of a law is the aim or general purpose of the enactment. Livonia v Dep't of Social Services, 423 Mich 466, 497; 378 NW2d 402 (1985). While the object must be expressed in the title, the body of the law must be examined to determine whether it embraces more than one object. Kent Co, ex rel Bd of Supervisors of Kent Co v Reed, 243 Mich 120, 122; 219 NW 656 (1928).

The purpose of the one-object provision is to avoid bringing into one bill diverse subjects that have no necessary connection. Mooahesh, *supra* at 564. An act may contain all matters germane to its object, Reed, *supra*, and any provisions that directly relate to, carry out, and implement the principal object. Livonia, *supra* at 499. Legislation, if it has a primary object, is not invalid because it embraces more than one means of attaining its primary object. Local No 1644, AFSC&ME, AFL-CIO v Oakwood Hosp Corp, 367 Mich 79, 91; 116 NW2d 314 (1962).

The one-object provision is to be construed reasonably

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[2]The health care professionals were dismissed by the trial court for lack of standing, and the remaining plaintiff is not a party to this appeal.

and not in so narrow or technical a manner as to frustrate the legislative intent. Kuhn v Dep't of Treasury, 384 Mich 378, 387-388; 183 NW2d 796 (1971). However, the Supreme Court has not hesitated to hold void legislation enacted to evade the procedural requirements that the constitution places on legislation. United States Gypsum Co v Dep't of Revenue, 363 Mich 548, 554; 110 NW2d 698 (1961).

1992 PA 270 is entitled:

> AN ACT to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; to provide for the development of legislative recommendations concerning certain issues related to death and dying; to prohibit certain acts pertaining to the assistance of suicide; to prescribe penalties; and to repeal certain parts of this act on a specific date.

Section 1 of the act provides:

> The legislature finds that the voluntary self-termination of human life, with or without assistance, raises serious ethical and public health questions in the state. To study this problem and to develop recommendations for legislation, the Michigan commission on death and dying is created. [MCL 752.1021; MSA 28.547(121).]

Sections 2 through 6 of the act establish the membership of the commission and define its role and duties.

Section 7 of the act creates a new crime of "criminal assistance to suicide," which makes it a felony where a person does either of the following:

> (a) Provides the physical means by which the other person attempts or commits suicide.

(b) Participates in a physical act by which the other person attempts or commits suicide. [MCL 752.1027(1)(a), (b); MSA 28.547(127)(1)(a), (b).]

1992 PA 270 had its origin in House Bill 4501. Examination of both the title and content of HB 4501 at various states of the legislative process is necessary to aid in the inquiry whether 1992 PA 270 contains more than one object.

As first introduced on March 7, 1991, the sole purpose of HB 4501 was to create a new public act to establish a commission to study certain issues related to death and dying. House Bill 4501 was entitled:

> A bill to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; and to provide for the development of legislative recommendations concerning certain issues related to death and dying.

At the time HB 4501 was introduced, Senate Bill 32 and House Bill 4038 were pending before the House Judiciary Committee. The bills were devoted to amending the Penal Code to "prohibit a person from causing, providing the means of, or acting as a participant in a suicide or attempted suicide."

On November 12, 1992, the House Judiciary Committee approved HB 4501. The title and provisions of HB 4501 were amended after the second reading on November 24, 1992, the day after Dr. Kevorkian provided assistance to another suicide, to include criminal proscriptions similar to those contained in SB 32. The amended version of HB 4501 became 1992 PA 270.

The original purpose of HB 4501, as expressed in both the title and body of the bill, was to create a new public act

to study certain issues related to death and dying. This bill had no regulatory authority. When HB 4501 was amended to add the substance of SB 32, the additional provisions had another and different objective--to amend the Penal Code to create the crime of criminal assistance to suicide.

The Attorney General posits both objectives are within the act's primary purpose of regulating assisted suicide. However, neither the original title of HB 4501 nor the title of 1992 PA 270 as enacted declare such a purpose.[3] A fair reading of 1992 PA 270 reveals that, although encompassing a single "subject,"[4] the legislation has two primary objectives. These objectives were originally the subjects of two distinct bills. One bill (HB 4501) encompassed the study of issues related to voluntary self-termination of life, with or without assistance, and another (SB 32) encompassed only the crime of criminal assistance to suicide. The suggestion that the amendment of HB 4501 to include the substantive provisions of SB 32 resulted in one primary purpose of "regulating assisted suicide" is unpersuasive in the absence of a comprehensive declaration of such a purpose in the title of the act. People v Milton, 393 Mich 234, 246-247; 224 NW2d 266 (1974).

Had the Legislature intended to codify or regulate the

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[3]If the primary purpose of HB 4501 was to regulate assisted suicide, it would have been unnecessary for the Legislature to amend the title of HB 4501 because a title need not be an index of an act's provisions. Builders Square v Dep't of Agriculture, 176 Mich App 494, 498; 440 NW2d 639 (1989).

[4]The one-object provision may not be circumvented by enacting a law that involves a single subject but is designed to accomplish different objectives. Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich 123, 129-130; 240 NW2d 193 (1976).

general "subject" of assisted suicide,[5] it could have notified the public of this intention by declaring a single broad purpose and by joining the object contained in HB 4501 with the object contained in SB 32 together in one bill. This the Legislature did not do. This failure resulted in the body of the act containing two distinct objects. The fact that the title was amended to reflect the addition of § 7 does not cure the constitutional infirmity. The one-object provision may not be circumvented by creating a title that includes different legislative objects. Hildebrand v Revco Discount Drug Centers, 137 Mich App 1, 11; 357 NW2d 778 (1984). We find, therefore, that 1992 PA 270 as enacted has two distinct objects that, although encompassing the same "subject," are not germane to each other, are directed toward different purposes and, when grouped together in one act, offend the constitutional one-object provision.[6] In reaching this conclusion, we recall the Supreme Court's pronouncement in Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich 123, 133; 240 NW2d 193 (1976):

> This Court is mindful of the worthy purpose and high motivation of the Legislature and the proponents of the subject Act. It also is mindful of

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[5]See, *e.g.*, Builders Square, *supra*, n 3 (a case on which the Oakland County prosecutor relies), and numerous other codified areas of the law, *e.g.*, the Drain Code, MCL 280.1 *et seq.*; MSA 11.1001 *et seq.*, and the Insurance Code, MCL 500.100 *et seq.*; MSA 24.1100 *et seq.*

[6]To buttress our conclusion, though certainly not controlling, we have in this case the opinion from the counsel for the House Judiciary Committee that the amendment of HB 4501 would violate the one-object provision of art 4, § 24. Similarly, in analyzing HB 4501 as enrolled, the House Legislative Service Bureau opined that the bill is subject to a constitutional challenge based on art 4, § 24.

> the basic dictates of the Constitution of this state. Our test cannot be one of policy but one of constitutionality. On that test, the Act must fall.

The Oakland County Prosecutor relies on People v Trupiano, 97 Mich App 416; 296 NW2d 49 (1980). In Trupiano, provisions of the Public Health Code creating departments charged with enforcing the code and including a provision to prescribe criminal penalties for possession of controlled substances, survived a constitutional challenge based on a violation of the one-object provision.

Trupiano is distinguishable from the instant case. Trupiano involved a legislative enactment that constituted a "code." As noted by the Court in Trupiano, *supra* at 420:

> The Supreme Court has recognized a wide degree of discretion in reviewing legislative enactments which constitute a "code." In Advisory Opinion re Constitutionality of 1972 PA 294 [389 Mich 441; 208 NW2d 469 (1973)], the Court noted at 463:
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> "Emphasis is given to the fact that the subject matter constitutes a code and that inherently the scope of a code must be broad enough to encompass the various facets necessary to the drafting of a unified law. If we fail to permit such a design codes may not be enacted in Michigan so long as the 'one-object' limitation is present in the constitution."

Thus, codes that have a general purpose or aim that is implemented through a number of specific statutory provisions have survived challenges based on a violation of the one-object provision because if too strict a reading is given art 4, § 24, no codes enacted in Michigan would be constitutional. See Advisory Opinion re Constitutionality of 1972 PA 294, *supra* at 463. The act in this case is not a

codification, and, as previously noted, the attempt to define the object broadly to encompass all subjects related to the issue of assisted suicide is unpersuasive.

1992 PA 270, as amended by 1993 PA 3, violates the one-object provision of Const 1963, art 4, § 24 and, therefore, is unconstitutional. In light of this conclusion, we need not address the remainder of the constitutional challenges to the act. However, in anticipation of Supreme Court review, and in the interest of judicial economy, we will briefly address Ms. Hobbins' argument that Michigan's assisted suicide statute deprives its citizens of a constitutional right protected by the Due Process Clause of the Fourteenth Amendment.

In Roe v Wade, 410 U.S. 113, 153; 93 S Ct 705; 35 L. Ed. 2d 147 (1973), the United States Supreme Court posited the existence of a "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court, however, expressly stated that this "privacy right . . . cannot be said to be absolute," and noted that it has consistently "refused to recognize an unlimited right of this kind in the past." Id. at 154. Essential to the analysis in the case at bar is the Supreme Court's recognition and affirmation of the state's compelling interest in protecting life: "The State's important and legitimate interest in . . . protecting . . . fetal life after viability [justifies legislation that] may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Id. at 163-164. Furthermore, "a State [has] an unqualified interest in the preservation of human life." Cruzan v Director, Missouri Dep't of Health, 497 U.S. 261, 282; 110 S Ct 2841; 111 L. Ed. 2d 224 (1990). The constitutionality of legislative enactments to protect life is clearly

established in our law.[7]

When individuals assert constitutional rights against state regulation, whether encompassed by the "zones of privacy" recognized in Roe or acknowledged as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, a court must balance the individual interest against the state's interest. Cruzan, *supra* at 279; Roe, *supra* at 154. It is, of course, necessary that the asserted right be one that is accorded constitutional protection under our law. That is not the case in the instant matter.

Determination of the existence of "rights not readily identifiable in the Constitution's text" sometimes, as in the opinions under review here, seems merely "the imposition of the [judges'] own choice of values." Attempting "to identify the nature of the rights qualifying for heightened judicial protection," the Supreme Court has ruled "that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' [Alternatively,] they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'" Bowers v Hardwick, 478 U.S. 186, 191-192; 106 S Ct 2841; 92 L. Ed. 2d 140 (1986) (citations omitted). The "right" asserted by Ms. Hobbins--the right to commit suicide--satisfies neither definition.

The scope of rights encompassed by the concept of ordered liberty does not include the right to commit suicide, much less the right to assisted suicide. The

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[7]The legitimate state interest in protecting life recently was reaffirmed in Planned Parenthood of Southeastern Pennsylvania v Casey, 505 U.S. ___, ___, ___, ___, ___; 112 S Ct 2791; 120 L. Ed. 2d 674, 710, 738, 773, 783 (1992).

"guarantee of personal privacy" has been "extended to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." Roe, *supra* at 152-153 (citations omitted). Judicial discovery of a right to terminate one's life is not a logical extension of this catalog of rights.[8] Liberty and justice will not cease to exist if a right to commit suicide is not recognized.

Ms. Hobbins argues that the liberty interest[9] recognized in Cruzan supports the broader concept of a right to self-determination, which necessarily encompasses the right asserted here. However, Ms. Hobbins misapprehends the true nature of the right recognized in Cruzan.

The Supreme Court began its discussion of the issue before it in Cruzan by noting the common-law basis of "the right of a competent individual to refuse medical treatment [and stating] that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." The Court noted: "This is the first case in

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[8]Even in these areas, the Supreme Court has not found that all rights are implicit in the concept of ordered liberty. For example, the Court has expressly rejected the contention that a right to consensual sodomy is implicit in the concept of ordered liberty, or that an unwed father's liberty interest was violated by a statute's presumption that the husband of the child's mother is the child's father and that denied him any right to visitation. Bowers, *supra*; Michael H v Gerald D, 491 U.S. 110; 109 S Ct 2333; 105 L. Ed. 2d 91 (1989).

[9]The Cruzan Court noted that "many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy," [see, e.g., In re Quinlan, 70 NJ 10; 355 A2d 647 (1976)] but expressed its belief that "this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." Cruzan, 497 U.S. 261, n 7, 111 L. Ed. 2d 224, 110 S. Ct. 2841.

which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'" The Court then made clear its intention to "follow the judicious counsel . . . 'not to attempt, by any general statement, to cover every possible phase of the subject.'" Cruzan, *supra* at 277-278 (citation omitted). The right recognized in Cruzan was only to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's death. Furthermore, even this limited right is not absolute: "It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." Id. at 281. The right asserted by Ms. Hobbins is not a fundamental liberty; liberty and justice will not cease to exist as a result of this Court's decision not to accord it constitutional status.

Neither is the right to commit suicide deeply rooted in this nation's traditions. At common law, a suicide incurred criminal liability and harsh penalties. "Although the States abolished the penalties . . ., they did so to spare the innocent family and not to legitimize the act." Id. at 294 (Scalia, J., concurring). Furthermore, "case law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense. . . . And most states that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful." Id. at 294-295 (citation omitted). There is, therefore, no significant support for the proposition that a right to commit suicide is rooted at all in our nation's history.

There is a "rationalizing principle" that justifies the inclusion of nontextual rights on the list of protected rights,

that designates them as "implicit in the concept of ordered liberty." Faced with an individual-rights challenge to a legislative enactment, the courts must answer this question: "Does [the statute] violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?'" Palko v Connecticut, 302 U.S. 319, 325, 328; 58 S Ct 149; 82 L Ed 288 (1937) (citation omitted). With regard to an alleged right to commit suicide, the answer is clearly no. We therefore decline to find such a right.

The wisdom of judicial circumspection in discovering new constitutional rights has been cogently expressed by Justice Byron White:

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, . . . the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority. [Moore v East Cleveland Ohio, 431 U.S. 494, 544; 97 S Ct 1932; 52 L. Ed. 2d 531 (1977) (White, J., dissenting).]

The orders in Docket Nos. 164963 and 172399

regarding the constitutionality of the statute are affirmed. The orders in Docket Nos. 171056, and 172399 dismissing the charges of providing assistance to suicide are affirmed.[10] Judge Stephens' order in Docket No. 164963 and Judge Kaufman's order in Docket No. 171056 are reversed with respect to their holdings regarding a constitutional right to commit suicide. Judge Kaufman's order in Docket No. 171056 regarding the constitutionality of the statute is also reversed.

SHELTON, J. (concurring in part and dissenting in part).

I concur in the opinion of Judge Fitzgerald that 1992 PA 270, as amended by 1993 PA 3, violates the one-object provision of our state constitution. I therefore concur in Judge Fitzgerald's resolution of that issue in each of these three cases. I dissent from that portion of the opinion that dismisses the claims under the Due Process Clause of the United States Constitution and write separately to address that issue.

It is the seminal claim of Ms. Hobbins, Dr. Kevorkian and the original physician and terminally ill plaintiffs in Hobbins, that a suffering, terminally ill person has a constitutional right to control his or her own body to end his or her suffering by death and with the assistance of a physician. The constitutional claim is derived from the Due Process Clause of the Fourteenth Amendment of the United States Constitution, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." For over one hundred years, the United States Supreme Court has held that this clause includes substantive as well as procedural rights. See Mugler v Kansas, 123 U.S. 623; 8 S Ct 273; 31 L Ed 205

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[10]Judge Kaufman reached the correct result in dismissing the case, albeit for the wrong reason.

(1887); Poe v Ullman, 367 U.S. 497; 81 S Ct 1752; 6 L. Ed. 2d 989 (1961); Daniels v Williams, 474 U.S. 327; 106 S Ct 662; 88 L. Ed. 2d 662 (1986); Planned Parenthood of Southeastern Pennsylvania v Casey, 505 U.S. ___; 112 S Ct 2791; 120 L. Ed. 2d 674 (1992). In this manner, the constitution protects the fundamental rights of citizens that comprise their "liberty" against invasion by the state.

The scope of these substantive liberties is not limited to those provided by the Bill of Rights or to those rights recognized at the time the clause was enacted. Nor, as urged by appellants, can they be defined by some formula based upon prior "tradition and practices," although tradition is a factor. The Supreme Court recently addressed this concept in Casey, 120 L. Ed. 2d 674, 505 U.S. ___, 112 S Ct 2791 at 2806, quoting Poe, *supra* at 542:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:
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> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has

not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."

If the determination of which liberties are included within the meaning of "due process" were delimited by tradition alone, no expansion of liberties in the name of the constitution would ever have been made in the last two centuries.[1]

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[1]The conclusion that "the right to commit suicide," *ante* at ___, is not deeply rooted in this nation's traditions certainly is not therefore dispositive. More importantly, the statement that "there is . . . no significant support for the proposition that a right to commit suicide is rooted at all in our nation's history," *ante* at ___, is factually incorrect. Suicides by terminally ill persons have occurred throughout our history and indeed have often taken place with the quiet and unpublicized assistance of treating physicians and family members. The following was noted in Quill, Cassel & Meier, "Care of the Hopelessly Ill, Proposed Clinical Criteria for Physician-assisted Suicide", *The New England Journal of Medicine* (November 5, 1992) 1380, 1381:

> It is not known how widespread physician-assisted suicide currently is in the United States, or how frequently patients' requests are turned down by physicians. Approximately 6000 deaths per day in the United States are said to be in some way planned or indirectly assisted, probably through the "double effect" of pain-relieving medications that may at the same time hasten death or the discontinuation of or failure to start potentially life-

Our judicial history has of course been to the contrary and we must look initially for guidance to the panoply of rights that the Supreme Court has previously defined as individual "liberties" to determine if a personal right to end suffering by hastening one's own death is rationally within the scope of that constitutional protection. I conclude that it is.

Most of the Supreme Court decisions that describe the compass of an individual's right to "liberty" or freedom from government intrusion have involved personal and family decisions. These cases must be viewed as a developing "rational continuum," as described by Justice Harlan in Poe, *supra* at 543. Taken together, they demonstrate that the Supreme Court has found that the Due Process Clause of the United States Constitution limits the power of the government to intrude into personal decisions involving the basic integrity of an individual's body or family. Justice O'Connor spoke for the Court in Casey, 120 L. Ed. 2d 674, 505 U.S. ___; 112 S Ct 2791 at 2807, and described the essence of the cases defining "liberty":

> Our law affords constitutional protection to personal decisions relating to marriage,

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prolonging treatments. From 3 to 37 percent of physicians responding to anonymous surveys reported secretly taking active steps to hasten a patient's death, but these survey data were flawed by low response rates and poor design. Every public-opinion survey taken over the past 40 years has shown support by a majority of Americans for the idea of physician-assisted death for the terminally ill.

Additionally, the issue here is not whether a healthy person should be granted an unrestricted "right to commit suicide" but rather the ability of a suffering terminally ill patient to decide to end that suffering with death and to have a doctor assist in implementing that decision.

> procreation, contraception, family relationships, child rearing, and education. Carey v Population Services International, 431 U.S. [678, 685; 431 U.S. 678, 97 S Ct 2010; 52 L. Ed. 2d 675 (1977)]. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v Baird [405 U.S. 438, 453; 92 S Ct 1029; 31 L. Ed. 2d 349 (1972)]. Our precedents "have respected the private realm of family life which the state cannot enter." Prince v Massachusetts, 321 U.S. 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood where they formed under compulsion of the State. [Emphasis added.]

In Casey, the Court reaffirmed its decision in Roe v Wade, 410 U.S. 113; 93 S Ct 705; 35 L. Ed. 2d 147 (1973), that a woman has the liberty to decide whether to have an abortion before the viability of the fetus. The Court in Roe described this realm of protected personal liberties as the "right of privacy." In Cruzan v Director, Missouri Dep't of Health, 497 U.S. 261; 110 S Ct 2841; 111 L. Ed. 2d 224 (1990), the Supreme Court addressed the issue that had been posed earlier in In re Quinlan, 70 NJ 10; 355 A2d 647 (1976). In Quinlan, the court found that a severely brain-damaged woman had a right of privacy, protected by

the federal constitution, that included her right to terminate the use of equipment that was prolonging her existence. In Cruzan, *supra* at 278, the Supreme Court affirmed the principal of Quinlan that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" even if that refusal will result in that person's death. The Court found that even "the refusal of artificially delivered food and water is encompassed within that liberty interest." Cruzan, *supra* at 287 (Justice O'Connor, concurring). As Chief Justice Rehnquist put it, "the choice between life and death is a deeply personal decision of obvious and overwhelming finality." Cruzan, *supra* at 281.[2]

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[2]The Cruzan decision followed a number of state court decisions in addition to Quinlan. Some of those opinions offer insights that are helpful. In Bouvia v Superior Court, 179 Cal. App. 3d 1127, 1147; 225 Cal Rptr 297 (1986), Justice Compton stated in his concurring opinion:

> Elizabeth apparently has made a conscious and informed choice that she prefers death to continued existence in her helpless and, to her, intolerable condition. I believe she has an absolute right to effectuate that decision. This state and the medical profession instead of frustrating her desire, should be attempting to relieve her suffering by permitting and in fact assisting her to die with ease and dignity. The fact that she is forced to suffer the ordeal of self-starvation to achieve her objective is in itself inhumane.
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> The right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected. That right should, in my opinion, include the ability to enlist assistance from others, including the medical profession, in making death as painless and quick as possible.

And in McKay v Bergstedt, 106 Nev 808, 818, 822; 801 P2d 617 (1990), the Nevada Supreme Court stated:

> [A]t some point in the life of a competent adult patient, the

Against this background, we are squarely presented with the question whether the situation of an assisted suicide to a suffering terminally ill person is significantly different from the rights defined by the Supreme Court in those cases. To pose the question makes the answer obvious. If a terminally ill person can lawfully end her life by disconnecting a life-sustaining machine (Cruzan), why cannot she end that same life by connecting a life-ending machine? If a healthy woman can lawfully terminate a healthy fetus (Roe, Casey), does not that same woman who is later terminally and painfully ill have a right to terminate her own life? Does the state have a right to totally prevent a terminally ill person from ending her life by charging the doctor who assists her with a felony punishable by four years' imprisonment, or even with murder?[3] If a doctor

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present or prospective quality of life may be so dismal that the right of the individual to refuse treatment or elect a discontinuance of artificial life support must prevail over the interest of the State in preserving life. In instances where the prospects for a life of quality are smothered by physical pain and suffering, only the sufferer can determine the value of continuing mortality. . . .

* * *

. . . The State's interest in the preservation of life relates to meaningful life.

[3]In a separate opinion in People v Kevorkian, Docket No. 154740, Judges Fitzgerald and Taylor have held that Dr. Kevorkian may be charged with the crime of murder for assisting in a suicide before the enactment of the statute that is at issue in these cases. Although the majority has chosen to separate the opinions, these cases were consolidated because they all pose the same constitutional issue. I have dissented from the opinion in Docket No. 154740 primarily on the basis of the reasons set forth in my opinion in these cases. It seems self-evident that if the state may not constitutionally criminalize conduct with a felony punishable by four years' imprisonment, it clearly may not do so with a murder charge.

(or even a nurse or medical assistant) can lawfully end a patient's life by disconnecting a life-sustaining machine (Cruzan), why cannot a doctor do the same by connecting a life-ending machine? If a healthy woman has a right to have a doctor assist (and indeed can only use a doctor to assist) to lawfully terminate a healthy fetus (Roe, Casey), does not that same woman who is later terminally and painfully ill have a right to have a doctor assist to terminate her own life? If ending one's own life is a lawful act, how can the state punish a doctor who assists in that lawful conduct?

A federal district court in the State of Washington very recently analyzed a similar assisted-suicide statute in that state and similarly concluded that Casey and Cruzan require the courts to find a constitutionally protected liberty interest in the decision of a terminally ill person to hasten death. In Compassion in Dying v Washington, ___ F. Supp. ___ (WD Wash, May 3, 1994) (Docket No. C94-119R), Judge Rothstein held:

> Like the abortion decision, the decision of a terminally ill person to end his or her life "involves the most intimate and personal choices a person may make in a lifetime" and constitutes a "choice[] central to personal dignity and autonomy."

and:

> There is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death. From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced,

mentally competent, terminally ill adult.

The majority opinion on this issue attempts to draw such a distinction from Cruzan on the basis that "the right recognized in Cruzan was only to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's death." Ante at ___. This is apparent acceptance of the state's suggestion that it is the active, rather than passive, nature of the assistance here that extinguishes the right of the suffering patient. Aside from the serious question whether starving Ms. Cruzan to death was "natural," the best reply to this suggestion is perhaps found in Justice Scalia's concurrence in Cruzan, *supra* at 296-297, quoting 4 Blackstone, Commentaries, p 189:

> Suicide, it is said, consists of an affirmative act to end one's life; refusing treatment is not an affirmative act "causing" death, but merely a passive acceptance of the natural process of dying. . . . It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. . . .
>
> . . . Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to "put an end to his own existence."

If the active-passive distinction has any meaning, it would not be in the situations presented here. The third person who turns off the life-supporting machine must perforce

affirmatively do so. Here, the assistant places the means within the control of the patient and allows the patient to take the final active step.

On a far less legalistic basis, the honest intention of the assisting person in both instances is the same. When the medical person turned off the life supporting machinery to Karen Quinlan, that person intended and expected the patient to die just as surely as did Dr. Kevorkian when he showed his suffering patients how to activate his lethal devices and placed the devices within their control. If anything, the intent is less onerous in these instances because, at least as compared to Ms. Quinlan and other incompetent patients, these patients made the final personal decision and took the final personal action for themselves.

It is also suggested by the state that it is the involvement of another person in assisting the death that makes the situation different. Such a contention ignores the clear import of Roe, Casey, Quinlan, Cruzan, and all the other due process cases involving medical procedures. A woman's right to have an abortion involves, by necessity and for safety, the assistance of another person. Similarly, it is obvious that neither Ms. Quinlan nor Ms. Cruzan was going to be able to terminate their life-support equipment without the assistance of another person. Indeed, the availability of that assistance was what those cases were, and what these cases are, ultimately about. Again, if anything, the situations here involve less immediate assistance because the patients personally activated the equipment that caused their death.

In the end, as far as the liberty interest of the patient is concerned, the truth is that there is simply no rational distinction between assisting the termination of life support to a suffering terminally ill patient and assisting the administration of life-ending measures to a suffering

terminally ill patient.

Aside from a review of the cases in which the Supreme Court has previously defined the rights and liberties protected by constitutional due process, we must decide if the right to end personal pain and suffering is "implicit in the concept of ordered liberty." Liberty in the context of our constitution means the freedom of an individual to determine matters about himself for himself and not have others, even if they are in the majority and thus comprise the government, force their will upon the individual. The basic concept of self-determination and personal autonomy is the central point of our constitutional structure. In matters that relate solely to ourselves, we alone are free to decide our personal fate and neither the mob nor the government may take that away from us. As the Supreme Court said over one hundred years ago in Union Pacific R Co v Botsford, 141 U.S. 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891):

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley on Torts, 29.

In the context of these cases, the essence of self-determination is the decision whether to continue to endure insufferable pain. The power to determine the limits to which one can endure pain and agony is certainly intrinsic to this basic concept of personal autonomy. It is difficult to imagine a more personal choice than whether to continue life when faced with a terminal and excruciatingly painful condition. The poignant truth of

Justice O'Connor's observation in Casey, *supra*, makes it worthy of repetition:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. [Casey, 120 L. Ed. 2d 674, 505 U.S. ___; 112 S Ct 2791 at 2807.]

The real issue in these cases is not whether there is some broad "right to commit suicide" but, rather, whether an individual, and not the government, has the right of choice between enduring pain and suffering or ending that suffering with death. Stated conversely, the issue is whether our government has the right to force us, against our will, to live out a life of pain and suffering when we have done no wrong to anyone else. I conclude, without hesitation, that our constitution preserves and guarantees our right to make that decision for ourselves and that it forbids the government from taking that choice from us when we have done no wrong. There could be no more basic right in our ordered concept of liberty.

This conclusion, however, does not mean that the state may not regulate and control that choice. As the Court said in Cruzan, *supra* at 279, quoting Youngberg v Romeo, 457 U.S. 307, 321; 102 S Ct 2452; 73 L. Ed. 2d 28 (1982):

> But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."

Certainly where the state has a legitimate interest in such matters as the preservation of life and family, the Court has indicated that it may fetter individual choice in those areas with a variety of controls and impediments

designed to ensure that the choice is voluntarily and knowingly made and that it is implemented under safe and reasonable conditions. Indeed, in Cruzan, the Court upheld Missouri's insistence upon a requirement of clear and convincing evidence to establish the patient's true intent. And, in Webster v Reproductive Health Services, 492 U.S. 490; 109 S Ct 3040; 106 L. Ed. 2d 410 (1989), as well as Casey, *supra*, the Court clearly indicated that it would allow the states considerable latitude in controlling and regulating the choice of a woman to have an abortion.

The State of Michigan clearly has public interests in the decision of a suffering terminally ill patient to end that suffering with death. In addition to its generally recognized interest in the preservation of life, the state may legitimately be concerned, for example, that the patient be given ample opportunity for medical consultation about the nature and permanence of the underlying condition, that the patient has received available medical and psychiatric assistance, or that the procedure is performed under proper medical conditions by an appropriate medical assistant. Indeed, this is an area of medical concern where the state clearly should be involved to ensure the public welfare.

But the extent to which the state may fetter or control the patient's liberty to choose death is not before us. If the Michigan assisted suicide statute "has the purpose or effect of placing a substantial obstacle in the path" of the exercise of a constitutionally protected liberty interest, the statute violates due process. Casey, 120 L. Ed. 2d 674, 505 U.S. ___, 112 S Ct 2791 at 2820. In this statute, the state has chosen to do virtually the only thing that the constitution does not allow: the absolute prohibition of the making of that personal choice by criminalizing it. The appellants assert that this is a permissible means of "regulating" a personal liberty interest because of the overwhelming

interest of the state. The argument stems from what some have characterized as the "slippery slope" fear that anything less than a total prohibition of assisted suicide will eventually result in the uncontrolled and irresponsible taking of a multitude of lives in situations far less compelling than the individuals involved in these cases. The argument is unsound. If a state can "regulate" such a personal choice by completely prohibiting it, there would be no meaningful choice in the first instance. As stated in Compassion in Dying v Washington, *supra*:

> But despite the general validity of the State's concern, the slippery slope argument cannot prevail in this instance. It may be difficult to define the kinds of assistance which are necessary and should be permitted in order to honor terminally ill patients' protected liberty interest in hastening their death. However, that is not a sufficient excuse for precluding entirely the exercise of a constitutional right. The court has no doubt that the legislature can devise regulations which will define the appropriate boundaries of physician-assisted suicide for terminally ill individuals, and at the same time give due recognition to the important public policy concerns regarding the prevention of suicide.

We need not speculate here about the extent to which the state may regulate the liberty involved here. We need only say, and should say, that the state may not completely outlaw it as this statute purports to do. This government may not totally take from us our inherent right to determine not only who we are but, even more essentially, whether we are.

TAYLOR, J. (concurring in part and dissenting in part).

I join Judge Fitzgerald's substantive due process

analysis without any reservations. However, I respectfully dissent from the majority's interpretation of the title-object clause, Const 1963, art 4, § 24. The assistance to suicide act (the Act), 1992 PA 270, as amended by 1993 PA 3, MCL 752.1021 *et seq.*; MSA 28.547(121) *et seq.*, does not violate this constitutional provision.

At the outset, I would call attention to the well-established maxims of judicial review applicable in cases where constitutional challenges are brought against legislative enactments:

> A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation. . . . Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt. [Rohan v Detroit Racing Ass'n, 314 Mich 326, 341-342; 22 NW2d 433 (1946).]

Construing identical language over a century ago, our Supreme Court explained the purpose of the title-object clause as follows:

> The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with

> a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it. [People v Mahaney, 13 Mich 481, 494-495 (1865).]

In finding the Act violative of art 4, § 24, the lower court opinions, as well as the majority here, emphasize that this clause is intended to prevent the combination in one bill of legislative goals or objects "having no necessary connection." The majority concludes that the Act contains two objects--study of possible legislative action concerning assisted suicide and the criminalization of assisted suicide--and that these objects have no necessary connection. This confuses the object of the Act with the means utilized to accomplish that object. It also gives a crabbed reading to the phrase "no necessary connection," depriving it of its intended meaning by taking it out of its context in the

Mahaney case.

The majority argues that the statute has one subject, but two objects. That is, at best, to put too fine a point on things. Our Supreme Court has explained that "the 'object' of a law is its general purpose or aim." Livonia v Dep't of Social Services, 423 Mich 466, 497; 378 NW2d 402 (1985). Furthermore,

> [t]o require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone, would not only be senseless, but would actually render legislation impossible. [Mahaney, *supra* at 495.]

The majority would hold that if they can plausibly posit the existence of two "objects," then these "objects" have no necessary connection. This is contrary to the meaning of the phrase as used by the Mahaney Court. More importantly, it confuses the means used to accomplish a general object with the object itself.

Our Supreme Court "has long and consistently said that art 4, § 24, and similar 'one object' provisions in earlier constitutions, are to be construed reasonably 'and not in so narrow and technical a sense as unnecessarily to embarrass legislation.'" Kuhn v Dep't of Treasury, 384 Mich 378, 387; 183 NW2d 796 (1971) (citations omitted). The majority refuses to acknowledge the import of this holding, even though citing it approvingly, by immersing itself in irrelevant procedural minutiae that does not pertain to the title-object analysis. The general legislative intent as expressed in the Act is the only appropriate focus of a title-object inquiry. Simply stated, a court should endeavor to discern a unity of purpose and only when such cannot be found declare the Act invalid. To do otherwise is unnecessarily to embarrass legislation. The majority's

position runs contrary to the appropriate deference to the Legislature that has characterized judicial review in this state. Rohan, *supra*.

In the case at bar, it is unquestionable, I believe, that the general purpose or object of the Act is to formulate an appropriate legislative response to the issue of assisted suicide. That there would be different provisions carrying forward this aim not only is proper but is altogether routine and expected when the Legislature does its work.

The provisional criminalization of assisted suicide, while the Commission on Death and Dying took testimony and made recommendations regarding a long-term solution, was intended to allow the issue to be addressed in an atmosphere conducive to calm deliberation. This method of assisting the commission is consistent with the object of the legislation. The Act, therefore, "is confined to the means supposed to be important to the end indicated," Mahaney, *supra* at 496, and merely "authorizes the doing of all things which may fairly be regarded as in furtherance of the general object of the enactment." Kent Co, ex rel Bd of Supervisors of Kent Co v Reed, 243 Mich 120, 123; 219 NW 656 (1928). The Act does not violate the title-object clause of art 4, § 24.[1]

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[1]Although acknowledged as "certainly not controlling," *ante* at ___, the majority cites the opinions of counsel for the House Judiciary Committee and the House Legislative Service Bureau that the Act violates the title-object clause. The majority feels that such opinions buttress their conclusion that the Act is unconstitutional. To so hold requires that one assume that upon reading and considering the advice from their staff the members of the Legislature decided to act in violation of their oaths to comply with the Constitution. This is an impermissible assumption. Rather, the assumption should be that, expressly alerted to a constitutional issue, they considered it and found that acting in the way they did was constitutional. Marbury v Madison, 5 U.S. (1 Cranch) 137, 179-180, 2 L. Ed. 60 (1803).

Neither does the Act violate the change of purpose clause of art 4, § 24.[2] The clause states:

> No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

A related provision (the "five-day rule"), found in Const 1963, art 4, § 26, states:

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days.

In Anderson v Oakland Co Clerk, 419 Mich 313, 329-330; 353 NW2d 448 (1984), our Supreme Court, discussing the change of purpose clause and the five-day rule, stated:

> These are not recent provisions. A long history underscores an intent through these requirements to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit.
>
> The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule.

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[2]Though not discussed in the majority opinion, I briefly discuss the issue of the change of purpose clause because it was decided in the three lower court opinions under review.

The opponents of the statute assert that inclusion of the temporary criminalization provision violated the change of purpose clause. However, as I have earlier indicated, there was only one purpose served by all provisions, and thus there is no violation of the change of purpose clause of art 4, § 24.

Furthermore, even if 1992 PA 270 violated the change of purpose clause, the entire Act was amended and reenacted as 1993 PA 3. An amendatory act by its nature supersedes its predecessor and replaces it. Lahti v Fosterling, 357 Mich 578, 587-588; 99 NW2d 490 (1959). Because 1993 PA 3 has at all times included both the criminalization and study commission provisions, and because 1993 PA 3 is the only relevant act, the change of purpose clause was not violated.

With regard to the five-day rule, the legislative history of the Act, recounted in the majority opinion, shows that the criminalization provision, in what became 1992 PA 270, was added on November 24, 1992, more than five days before passage on December 3, 1992. Therefore, I would hold that 1992 PA 270 complied with the requirements of the five-day rule. The Senate bill that became 1993 PA 3 was introduced on January 26, 1993, at which time it contained the study provisions and the temporary criminalization provision. It was enacted on February 25, 1993. Accordingly, I would hold that 1993 PA 3 also complied with the five-day rule.

As noted at the outset, I concur with Judge Fitzgerald's substantive due process analysis. However, I dissent with respect to Const 1963, art 4, § 24. I would reverse on that basis in Docket Nos. 164963 and 172399, and would affirm the analysis of art 4, § 24 in Docket No. 171056.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF WAYNE

Teresa Hobbins; Marie DeFord, Kenneth A. Shapiro; Kenneth Weinberger, M.D., William Drake, Pharm. D.; Elliot D. Luby, M.D.; Norman Bolton, M.D.; Kenneth Tucker, M.D.; Kathryn Upton, M.D.; B. Elliot Gryson, M.D., J.D.,
PLAINTIFFS,

v

Attorney General,
DEFENDANT.

_____/

CASE NO: 93-306-178 CZ
Hon. Cynthia D. Stephens

AMENDED OPINION AND ORDER

This Order is entered *sua sponte* per MCR 2.612 (a) to correct clerical errors in an Order entered on Thursday, May 20, 1993.

I. INTRODUCTION

Ten persons, seven health care professionals, two terminally ill lay persons and a friend of one of lay persons filed suit against the Attorney General over the constitutionally of 1992 PA 270 and 1993 PA 3 on March 1, 1993. They challenged the statute as written (facially) and as applied under the 1963 Michigan Constitution Article 4 § 24, Article 4 § 1 and Article 1 § 17. They base their Federal challenge on the Fourteenth Amendment.

This Opinion and Order is based on papers, pleadings and arguments presented on April 28, 1990. None of the letters or attempted filing received after that date were opened. The Motions pending before the Court are:

A) Defendant's Motion for Summary Disposition

B) Plaintiff's Motion for Summary Disposition

C) Plaintiff's Motion for Preliminary Injunction.

The Court grants the Defendant's Motion as it relates to Plaintiffs Ms. Marie DeFord, and Doctors Weinberger, Bolton, Tucker, Uptun and Gryson and denies it as to the others Plaintiffs. The Court grants the Plaintiffs' Motion as to the violation of Article 4 § 24. The Court finds that the Plaintiffs met their burden of proof on a preliminary injunction, although none is now needed.

The questions posed in the Motions and the conclusion of the Court in summary fashion are as follows:

1. DO THE PETITIONERS HAVE STANDING TO BRING A JUSTICIABLE ISSUE TO THE COURT?

   THE COURT ANSWERS YES AS TO THE TWO PETITIONERS WITH TERMINAL ILLNESS MS. HOBBINS, MR. SHAPIRO AND AS TO DR.'S DRAKE THE PHARMACIST AND DR. LUBY, THE PSYCHIATRIST ONLY. ALL OTHER PETITIONERS ARE DISMISSED AS BEING WITHOUT STANDING.

2. DOES THE STATUTE VIOLATE ARTICLE 4 § 24 OF THE MICHIGAN CONSTITUTION BY HAVING A TITLE WHICH DOES NOT RELATE TO ITS OBJECT?

   THE COURT ANSWERS YES.

3. DOES THE STATUTE VIOLATE ARTICLE 4 § 24 OF THE MICHIGAN CONSTITUTION BY CHANGING PURPOSE?

   THE COURT ANSWERS YES.

4. SHOULD A PRELIMINARY INJUNCTION ISSUE PENDING DISCOVERY OR FURTHER DEVELOPMENT OF THE RECORD OF THE RECORD ON THE CLAIMS PRESENTED?

   THE COURT ANSWERS YES.

   While no such injunction is necessary because of the violation of Article 4 the Court answers YES and finds a basis for injunctive relief to allow the development of a full record on the claim that the statute violates the Fourteenth Amendment rights of the terminally ill petitioners.

For these reasons this Court would declare the statue void due to violation of the Michigan Constitution Article 4 § 24.

II PROCEDURAL HISTORY

The parties and the amicus agree as to the procedural history of tho statutes. It is as follows:

1. House Bill 4501 (HB 4501) was introduced on May 7, 1991 and referred to the Committee on Judiciary.

2. Two other bills were before the Judiciary Committee at the time, House Bill 4038 (HB 4038) and Senate Bill 32 (SB 32), both titled "Crimes; Homicide; Aided Suicides, Prohibit".

3. Public hearings were held on HB 4501 on

December 19, 1991.

4. The Committee passed a substituted bill (H 4) sent it to the full House of Representatives for consideration on November 12, 1992.

5. The substitute was adopted on second reading on November 24, 1992.

6. Amendments were offered to H-4 adding a section 7 which created the felony of assisting a suicide on November 24, 1992.

7. These amendments were adopted and the entire bill passed on third reading by a vote of 72-29.

8. H-4 was received and filed in the Senate on November 25, 1992 and after more than five days was considered for immediate passage by the Senate after a suspension of rules on December 3, 1992.

9. On December 3, 1992 H-2 was passed by the Senate by a margin of 24-6.

10. On December 15 1992, H-4 was signed by the Governor as 1992 PA 270.

11. Senate Bill 211 (SB 211) was introduced on January 26, 1993 to amend 1992 PA 270. It to Judiciary.

12. SB 211 was reported favorably to the Senate on February 2, 1993.

13. SB 211 was passed by the Senate on February 11. 1993.

14. SB 211 was received and flyweight with the House of Representatives where it was referred to the Judiciary Committee.

15. A substitute was proposed on February 25, 1993 which, in addition to other things, gave the bill immediate effect.

16. The House vote by 2/3 (92-10) to give the bill immediate effect.

17. The Senate concurred in the substitute on February 25, 1993 and, also, by 2/3 vote gave the bill immediate effect.

18. The Governor signed SB 211 as 1993 PA 3 on February 25, 1993.

19. This lawsuit was filed on March 1, 1993.

III ANALYSIS

QUESTION ONE: DO ANY OF THE PLAINTIFFS HAVE STANDING TO BRING JUSTICIABLE ISSUES BEFORE THE COURT?

The Attorney General challenges each of the plaintiffs on issues of standing and ripeness. While acknowledging that MCR 2.605 and its predecessor, GCR 521.1 were designed to address pertinent legal issues before harm occurs, he asserts that the claims in this case are too tentative to warrant consideration. These plaintiffs, he seems to say, are not distinct in interest from the millions who consider the weighty issue of assisted suicide. Nor does the Attorney General believe that the issues raised in the suit are ripe for adjudication. He infers that this is what was warned of in Strager v Wayne County Prosecuting Attorney, 10 Mich App 166, 171 (1968), "a petition from potential criminals before they go forth into the night."

Plaintiffs counter with United States Aviex v Traveler's Insurance Co., 125 Mich App 578 (1983), quoting "a

declaratory judgment is appropriate even though future contingencies exist which will determine whether the 'controversy' actually becomes real," *supra*, at 585. The plaintiffs argue that facts pled by the plaintiffs are sufficient to plead an adverse interest because, "The medical professional plaintiffs in this case fear prosecution if they treat patients in a manner consistent with the standard of care." Plaintiffs' Response To Motion For Summary Disposition, p 8. In other portions of their argument the plaintiffs allude to both the asserted constitutional interests of the terminally ill plaintiffs and a vagueness argument for Ms. DeFord.

The analytical standard for the Court is whether the plaintiffs can "plead and prove facts which indicate an adverse interest necessitating the sharpening of issues raised." Shavers v Attorney General, 402 Mich 554, (1978). While it is not necessary that a plaintiff in a declaratory judgment place herself in harms way, she must present sufficient facts to separate her from those who bear a sheer intellectual interest or passing curiosity about an issue. The issue to be considered must, also, be susceptible to analysis without an actual injury occurring. Criminal statutes are particularly appropriate for such inquiry. Even before the declaratory judgment rule Michigan Courts were empowered to examine the constitutionality of criminal laws before their enforcement.

Both 1992 PA 270 and 1993 PA 3 (Statute) are well-suited to facial challenges in a declaratory action. However, not all of the plaintiffs meet the requirement of demonstrating an adverse interest. Plaintiff DeFord asserts a genuine concern that her friend Ms. Hobbins not be abandoned should she request assistance in dying. Plaintiffs Weinberger, Bolton, Tucker, Upton and Gryson all plead facts concerning their fear that they may refrain from exercising the appropriate standard of care regarding the

dispensation of pain medication out of concern for prosecution. These concerns, while genuine, do not present an issue which this Court can address in a declaratory judgment action. The facts present concerns and perhaps, moral dilemmas, but do not translate to standing on a justiciable issue.

Plaintiffs Hobbins and Shapiro are persons with a terminal illness who have peculiar standing to assert a liberty interest in a "right to die." They suffer illnesses which at some time may deprive them of mobility and the ability to actualize any intent to hasten their own demise without some assistance. It is wholly unjust to require them to wait until they are without the physical ability to actualize their desire to die to bring a case to court. The Plaintiff Dr. Luby is a psychiatrist who pleads facts to support an allegation that he treats those persons with known suicidal ideations with medications which could hasten those patients demise. He is one who reasonably needs to know whether "pain" means "mental pain" in order to conform his behavior to the law. Plaintiff Dr. Drake's professional duties specifically require that he fill prescriptions of physicians. He pleads facts that show that he is aware as a health care professional that these prescriptions are of a sufficient quantity that they will hasten death. He too, needs guidance for his professional life.

Therefore plaintiffs Hobbins, Shapiro, Luby and Drake have standing to seek guidance from this Court regarding 1992 PA 270 and 1993 PA 3. All other plaintiffs are dismissed per MCR 2.201 and 2.603.

QUESTION TWO: DOES 1992 PA 270 VIOLATE THE 1963 MICHIGAN CONSTITUTION ARTICLE 4 § 24 ON TITLE-OBJECT?

THE COURT ANSWERS YES.

The plaintiffs challenge 1992 PA 270 for violation of Article 4 § 24 of the Michigan Constitution on both its single purpose (title-object) and change of original purpose language. The title-object portion reads "No law shall embrace more than one object, which shall be expressed in its title. . ." Both the 1850 Constitution (Mich Const 1850 Art 4 § 20) and 1908 Constitution (Mich Const 1908 Art 4 § 21) included similar prohibitions. It is plaintiffs' argument that 1992 PA 270 violated that prohibition. The Attorney General counters with Builders Square v Department of Agriculture, 176 Mich App 494 (1989) lv den 433 Mich 912 (1989), ". . . . The goal of the title-object clause is notice, not restriction of legislation, and the title object clause is only violated where the subjects are *so diverse* in nature that they have no necessary connection. . . ." It is the Attorney General's position that multiple connected activities may be undertaken, as here, to achieve one broad object.

It is noteworthy the 1992 PA 270 was amended to include the criminal prescription on November 24, 1992 adopted as amended the next day and passed by the Senate less than two days later. The bill, unlike its companions, House Bill 4038 and Senate Bill 32, the titles of which stated that they were bills to criminalize assisted suicide, originally bore a title which spoke to study of the issue. The myriad House Judiciary Committee Amendments which developed into H-4, addressed the composition and process of a commission to study a vital issue not the creation of a new crime.

The Attorney General points to the title of 1992 PA 270 as a title which encompasses every action of the statute. He argues that the broad title language both encompasses all of actions and addresses a single object. That object is the proscription of assisted suicide.

It is, therefore, important to look at what 1992 PA 270 does in summary form. It:

1. Creates a Commission under the aegis of the Legislative Council to, study recommendation legislation on assisted suicide. "Section 4 (1) Within 15 months after the effective date of this act, the commission shall develop and submit to the legislature recommendations as to legislation concerning the voluntary self termination of life and

2. Creates a crime of assisted suicide" in Sec (7).

The Attorney General's arguments that these are multiple actions addressing a single goal does not prevail. These goals, while both arguably within the power of the legislature to achieve, are not those which have a *necessary* connection. These are two separate objects: to criminalize and to study a single subject. The original title of HB 2501 was, "A bill to create the Michigan Commission on death and dying, to prescribe its membership, powers, duties, and to provide for the development of legislative recommendations concerning issues related to death and dying." The new title of 1992 PA 270 encompasses study of assisted suicide; criminalization of assisted suicide and repeal of criminalization within six months of the study. While these activities most certainly relate to a single subject they do not have a single object. This statute is similar to 1975 PA 227 which was struck down by the Supreme Court in Advisory Opinions on the Constitutionality of 1975 PA 227, 396 Mich 123, 133 (1976) where the Court wrote,

> Applying the tests used by this Court in Reed, *supra*, these provisions might have been enacted in separate laws without in any way referring to or affecting one another. The term "object" as used in

Art 4, Section 24 was not meant to have unlimited breadth for an exceeding broad "object" could likely include several concepts that are wholly foreign and incongruous. Out test cannot be one of policy but of "constitutionality."

The fact that the title was amended to include two activities does not protect it from an Article 4 § 24 challenge. See People v Cary, 382 Mich 285, (1969). Therefore, the statute is void as violating Article 4 § 24. "Severability is not available in instances challenging constitutionality on this ground." Advisory Opinion, *supra*, 131.

QUESTION THREE: DOES 1992 PA 270 VIOLATE ARTICLE 4 AS IT RELATES TO CHANGE OF PURPOSE?

THE COURT ANSWERS YES.

The next part of Article 4 § 24 reads as follows, ". . . No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its purpose". The plaintiffs argue that the original purpose of HB 4501 and the purpose of 1992 PA 270 are not the same. The purpose of Article 4 § 24 on this subject was spoken to by the Supreme Court in Anderson v Oakland County Clerk, 419 Mich 313, 329 (1984), to "preclude last minute, hasty legislation and to provide to the public notice of legislation under consideration regardless of legislative merit".

In the instant case the public was invited to a hearing on HB 4501, a bill with a title and purpose to study assisted suicide. HB 4501 became H-4, still bearing a title discussing a study commission. It was amended to include Section 7 which created a crime on the House floor and passed with both the Commission (Section 4) and Criminal

Sections (Section 7).

The Attorney General at oral argument urged the Court to find that the introduction of 1993 PA 3, as SB 211 cured any defect as to notice to the public of either a change of purpose or change of title object of 1992 PA 270. There is no case in support of this proposition. Additionally, 1993 PA 3 went from introduction to passage in 30 days. This is unusual speed and efficiency. Even with wide-spread electronic media coverage neither the time from the metamorphosis of H-4 to the substance of 1992 PA 270 nor the legislative life-span of 1993 PA 3 gave a multi-million person citizenry time to digest and react to the subject matter.

However, even if 1993 PA 3 had an original purpose which did not suffer change throughout its legislative path, that does not redeem 1992 PA 270 from its constitutional infirmity.

QUESTION FOUR: DO THE PLAINTIFFS MEET THEIR BURDEN OF PROOF FOR A PRELIMINARY INJUNCTION?

The plaintiffs seek a preliminary injunction pursuant to MCR 3.310. The Attorney General opposes this relief under the same rule. This Court's finding that the statute is unconstitutional obviates the need for any injunction. However, for the purposes of a full appellate record the Court will issue its findings on the injunction.

There are four factors to be considered when injunctive relief is requested.

> Whether a preliminary injunction should issue is determined by a four-factor analysis harm to the public interest if an injunction issues, whether harm to the applicant in the absence of a stay

> outweighs the harm to the opposing party if a stay is granted, the strength of the applicants demonstration that the applicant is likely to prevail on the merits, and demonstration that the applicant will suffer irreparable injury if the preliminary injunction is not granted. See GCR 1963, 7057 (1)(b)(i). The inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant . . ." MSEA v Department of Mental Health, 421 Mich 152, at 157, 158, (1984).

The parties stipulated that there is no adequate remedy at law available to the Plaintiffs. Additionally, the Attorney General offered no oral or written opposition to the Plaintiffs position on the public interest factor. The controversy between the parties appears to be on two issues:

1. Can the plaintiff demonstrate an irreparable injury greater than that of people?
2. Can the plaintiffs demonstrate a substantial likelihood of success on the merits?

RISK OF HARM:

There is no dispute but that the plaintiffs' risk of harm, either criminal prosecution or loss of constitutional rights, is a harm for which there is no repair. It is equally clear that the Attorney General, acting for the people, suffers an immeasurable harm with the wrongful loss of any life. As substantial as both harms are, the greater harm accrues to the plaintiffs. The harm to the Attorney General as surrogate for the people, arises from any *legally* wrongful death. If the analysis of substantial likelihood of success on the merits is resolved in favor of the plaintiffs, the probability of a legally wrongful death diminishes. The harm from a loss of constitutional guarantees is certain.

SUCCESS ON THE MERITS:

The overwhelming majority of the advocacy on the Plaintiffs Motion For Injunctive Relief and the Defendants Motion For Summary Disposition focussed on whether the plaintiffs can demonstrate a substantial likelihood of success on the merits. The plaintiffs have pled and argued several theories of unconstitutionality. However, as the case stands after dismissal of several plaintiffs, the claims are narrowed. They are:

a) Violation of Article 4 § 24

b) Violation of the Due Process Clauses of the State and Federal Constitutions.

Since the Article 4 § 24 argument has been both discussed and decided, the Court will only discuss the Due Process issues.

The Plaintiffs' due process arguments are:

1. The statute is unconstitutionally vague and overbroad as it relates to Dr.'s Luby and Drake.

2. The statute invades the privacy or liberty interests of Ms. Hobbins and Mr. Shapiro.

The Court finds:

That only Dr. Luby meets the burden on vagueness.

That the Plaintiffs Luby and Drake meet their burden on overbreadth.

That both Plaintiffs Hobbins and Shapiro do demonstrate a substantial likelihood of success on their claim of an impermissive interference with their liberty interests.

Doctor Drake fails to demonstrate the substantial

likelihood of success his claim of vagueness. As the Plaintiffs note, "(as to vagueness) the primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for determination of guilt." Landry v Daley 208 F Supp 938, 951 (ND Ill, 1968). The statute as it relates to Dr. Drake is not, ". . . so obscure that men of common intelligence must *necessarily* guess at its meaning and differ as to its applicability."

Doctor Luby does meet his burden on the issue of vagueness. In Dr. Luby's case there is a legitimate question as to whether "pain" as defined in the statute includes emotional and mental pain. People of common intelligence could be reasonably confused by the statute's language. Consider that the Standard Jury Instructions distinguish between pain and suffering and mental pain S.J.I. 2d 50.02 (a)(b). Even our now obsolete No-Fault instruction S.J.I 36.02 explained that the operation of the mind was a body function and further distinguished between physical and emotional pain.

Neither Doctor Luby nor Drake meet the burden to demonstrate a substantial likelihood of success on the merits of a claim of violation of Due Process based upon breadth.

> The concept of overbreadth, on the other hand rests on the principles of Substantive Due Process which forbids the prohibition of certain individual freedoms. Rather the issue is whether the language of the statute given its normal meaning is so broad that its sanctions may apply to conduct protected by the Constitution. Landry, *supra*, at 951.

To prevail under such a theory either Doctor Luby or Drake would have to prove that they have an individual freedom which the statute affects. The Attorney General and Catholic Conference rightfully point out that not even the broadest construction of the Michigan or Federal Constitutions would support an individual freedom to cause death. If there is any individual freedom at issue here it accrues to Ms. Hobbins and Mr. Shapiro. Any privilege afforded to Doctor Luby or Drake derives from the rights of Ms. Hobbins and Mr. Shapiro. This is similar to the analysis that affords physicians and others the privilege to perform terminations of pregnancies only because of the right of women to choose to have them.

Ms. Hobbins and Mr. Shapiro meet their burden of demonstrating a substantial likelihood of success on the merits on their claim of a liberty interest in the ending of their own lives. The Supreme Court of the United States has written, "[n]o right is held more sacred or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific R Co. v Botsford, 141 US 251 (1891). In Cruzan v Director, Missouri Department of Public Health, 497 US 281 (1990), Chief Justice Rehnquist discussed this concept as one of self-determination. This Court finds that the right of self determination, rooted in the Fourteenth Amendment of the Federal Constitution (US Const, Amend 10) and of the Michigan Constitution, 1963 Mich Con Article 1 § 17, includes the rights to choose to cease living.

There are two Michigan cases which deserve attention. In People v Roberts, 211 Mich 187 (1920), an earlier Michigan Court upheld a conviction for first degree murder for giving his disabled wife a requested cup of

poison. The analysis in that case was based on an agreement that suicide was homicide. In the more recent case of People v Campbell, 124 Mich App 333 (1983), lv den 418 Mich 405 (1984), the Court analyzed the issue of whether aiding or encouraging a suicide was a homicide. In Campbell the Court found that consistent with Roberts suicide was not a crime at common law or by Michigan statute. While neither case addresses the constitutional issue, they both bolster a claim that the right to end ones life was not denied at common law and arguably is an interest of which one can only be deprived with "due process".

Federal Courts give us much guidance on the reach of the liberty interest in one's own body.

The Supreme Court has ruled that competent adults may refuse medical care. Vitek v Jones, 445 US 480 (1980), and Parham v JR 442 US 584 (1979). They have ruled that competent adults can refuse extraordinary health care measures. Washington v Harper, 494 US 210 (1990). Finally, the Court has ruled that a competent person may decline natural and artificial hydration and nutrition that other competent persons may be able to exercise that right under certain circumstances for an incompetent person. See Cruzan, *supra*. The states have, also, acknowledged the right to decline care, hydration and nutrition. In most cases the decision rests on the competence of the party seeking to effect the decision.

The requirement of competence in these cases demands that the individuals know and appreciate the consequences of their actions. Logically, a competent person would both know and appreciate that the refusal of medical care, ordinary and extraordinary, the refusal of hydration and nutrition, are all acts which will lead to death. As Justice Scalia wrote in Cruzan, "Starving oneself to death is no different from putting a gun to one's temple

as far as the common definition of suicide is concerned, the cause of death in both cases is the suicides conscious decision to put an end to his own existence" 4 Blackstone, Supra, at 189" Cruzan at 281.

Writing for majority in Cruzan, Chief Justice Rehnquist spoke extensively to an individuals liberty interest in her own life. His entire discussion of whether the State of Missouri could maintain a clear and convincing standard for determination of an incompetent patients desire to die was based on an analysis of whether the state had impermissively interfered with the patients liberty interest in her own life. "Although we think that the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform an inquiry as to whether the deprivation of that interest is constitutionally permissible...." Cruzan at 271. Even Professor Yale Kamisar who writes against assisted suicide in *Are Laws Against Assisted Suicide Unconstitutional?*, 23 Center Report 32 (1993), infers that he recognizes the Supreme Court's articulation of a constitutional right to die. Professor Kamisar seems to join Professor Roberts in a belief that since the right at issue albeit constitutional is not fundamental it is one which can only be curtailed in a manner which does not place an undue burden. The Attorney General concedes the existence of the right, as well. He writes:

> As the prohibition against assisted suicide contained in the statute at issue does not concern a fundamental right, the rational basis test is the appropriate standard with which to evaluate Plaintiffs' due process challenge:
>
> "(T)he proper test to use in determining whether a statute comports with either due process or equal protection is whether the legislative

> classification is rationally related to a legitimate governmental interest. Pioneer Ins. Co. v Allstate Ins. Co., 417 Mich 590, 600; 339 NW2d 470 (1983)."
>
> Attorney General Brief, page 35.

Justice Rehnquist urges an analysis based upon a balancing of interests.

> But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." Youngberg v Romeg, 457 US 307, 321; 102 S Ct 2452, 2461; 73 L Ed 2d 28 (1982). See also Mills v Rogers, 457 US 291, 299; 102 S Ct 2442, 2448; 73 L Ed 2d 16 (1982). Cruzan at 264.

If one finds the right to bodily integrity to be a fundamental right then the test as to any infringement on that right is articulated in Planned Parenthood v Casey, ___ US ___; 112 S Ct 2791 (1992). In that case the Court acknowledged the high level of interest the society has in preserving life. It acknowledged the intense level of interest the individual has in bodily integrity. The Court determined that the states could not place an undue burden on the right holder in furtherance of societal goals. This Court cannot envisage a more fundamental right than the right of self determination. Without that right none of the others such as speech, association, the right to bear arms or to due process can have meaning of effect.

Having found a right to die vested in Ms. Hobbins and Mr. Shapiro the Court is left to consider whether the statute places an undue burden or restriction on that right. I do not know. Nor can I know without the full

development of a record on such issues as what means are available to the handicapped to effectuate this right without assistance. The injunction on this issue would allow he development of such a record.

III CONCLUSION

The Court acknowledges that the only power which accrues to government is that which the people have given to it through the Federal and State Constitutions. All other power is reserved to the people. The people have given the policy making power in this state to the legislature not the Courts. A Court should only strike down a statute if it violates the rights of the people or inures power to government reserved to people.

It is solely because the Court concludes that Article 4 § 24 has been violated that this Court voids the statute.

Summary Disposition is granted to the Plaintiffs on Count I.

Summary Disposition is granted to the Defendant as to Plaintiffs, DeFord, Weinberger, Bolton, Tucker, Upton and Gryson on all counts.

(2)

Supreme Court, U.S.
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No. 94-1473
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

TERESA HOBBINS; KENNETH A. SHAPIRO;
WILLIAM DRAKE, Pharm. D.; and
ELLIOT D. LUBY, M.D.,

Petitioners,

v.

ATTORNEY GENERAL OF MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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42 pp

QUESTION PRESENTED

WHETHER MICHIGAN'S TEMPORARY AND NOW-EXPIRED ASSISTED SUICIDE STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION BY PROHIBITING A PERSON FROM INTENTIONALLY PROVIDING THE PHYSICAL MEANS, OR PARTICIPATING IN A PHYSICAL ACT, BY WHICH ANOTHER ATTEMPTS OR COMMITS SUICIDE.

PARTIES

In addition to the four individuals named as Petitioners on the cover of the Petition, the following six individuals were also listed as plaintiffs in the complaint in the Wayne County, Michigan Circuit Court: Marie DeFord, Kenneth Weinberger, Norman Bolton, Kenneth Tucker, Kathryn Upton, and B. Elliot Gryson. The trial court held that these six individuals did not have standing to challenge the statute. App. to Pet. 145a-147a. The Michigan appellate courts did not decide the question of their standing. App. to Pet. 5a, 109a-110a. Those six individuals are no longer parties to this proceeding.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
STATUTE INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	10
1. The Temporary Statute Prohibiting Physical Assistance to Suicide Has Expired, Thereby Mooting the Present Case	10
2. Petitioners Lack Standing	17
3. The Present Case Is Not Ripe For Review	21
4. The Michigan Supreme Court Correctly Applied Long-Standing Fourteenth Amendment Jurisprudence In Finding That The Constitution Does Not Protect A Right To Have Assistance In Committing Suicide	26
CONCLUSION	34

TABLE OF AUTHORITIES

Pages

Cases

Arizona v. Evans,
___ U.S. ___ (No. 93-1660,
March 1, 1995) 32

Babbitt v. Farm Workers,
442 U.S. 289; 99 S. Ct. 2301;
106 L. Ed. 2d 410 (1989) 24

Bender v. Williamsport Area
School Dist., 475 U.S. 534;
106 S. Ct. 1326; 89 L. Ed.
2d 501 (1986) 21,22

Berry v. Davis,
242 U.S. 468; 37 S. Ct. 208;
61 L. Ed. 441 (1917) 16

Board of Public Utility
Comm'rs v. Compania General
De Tabacos De Filipinas,
249 U.S. 425; 39 S. Ct. 332;
63 L. Ed. 687 (1919) 16

Bowers v. Hardwick,
478 U.S. 186; 106 S. Ct. 2841;
92 L. Ed. 2d 140 (1986) 28

Burke v. Barnes,
479 U.S. 361; 107 S. Ct. 734;
93 L. Ed. 2d 732 (1987) 13

Church of Scientology of
California v. United States,
506 U.S. ___; 113 S. Ct. 447;
121 L. Ed. 2d 313 (1992) 13

Pages

Collins v. City of Harker Heights,
503 U.S. 115; 112 S. Ct. 1061;
117 L. Ed. 2d 261 (1992) 27

Compassion in Dying v. Washington,
___ F.3d ___ (No. 94-35534,
March 9, 1995), 1995 U.S. App.
LEXIS 4589 28,31

Cruzan v. Director, Missouri
Dep't. of Health, 497 U.S. 261;
110 S. Ct. 2841; 111 L. Ed. 2d
224 (1990) 27,29

Hobbins v. Attorney General,
205 Mich. App. 194;
518 N.W.2d 487 (1994) 6

King Bridge Co. v. Otoe County,
120 U.S. 225; 7 S. Ct. 552;
30 L. Ed. 623 (1887) 22

Koch Refining Co. v. J.A.
Croson Co., 488 U.S. 469;
109 S. Ct. 706; 102 L. Ed. 2d
854 (1989) 14

Kremens v. Bartley,
431 U.S. 119; 97 S. Ct. 1709;
52 L.Ed. 2d 184 (1977) 15

Longshoremen v. Boyd,
347 U.S. 222; 74 S. Ct. 447;
98 L. Ed. 650 (1954) 24

Lujan v. Defenders of Wildlife,
504 U.S. 555; 112 S. Ct. 2130;
119 L. Ed. 2d 351 (1992) 19

Pages

Mills v. Green,
159 U.S. 651; 16 S. Ct. 132;
40 L. Ed. 293 (1895) 13

Northeastern Florida Contractors
v. Jacksonville, 502 U.S. ___;
113 S. Ct. 2297; 124 L. Ed. 2d
586 (1993) 14

Planned Parenthood v. Casey,
505 U.S. ___; 112 S. Ct. 2791;
120 L. Ed. 2d 674 (1992) 27,29,30

People v. Kervorkian No. 1,
205 Mich. App. 180;
517 N.W.2d 293 (1994) 7,8

People v. Kervorkian and
Hobbins v. Attorney General,
447 Mich. 436; ___ N.W.2d ___
(1994) 8,9

Regional Rail Reorganization Act
Cases, 419 U.S. 102; 95 L. Ct.
335; 42 L. Ed. 2d 320 (1974) ... 22

Rescue Army v. Municipal Court
of Los Angeles, 331 U.S. 549;
67 S. Ct. 1409; 91 L. Ed. 1666
(1947) 23

Roe v. Wade,
410 U.S. 113; 93 S. Ct. 705;
35 L. Ed. 2d 147 (1973) 30

Southern Pacific Terminal Co.
v. I.C.C., 219 U.S. 498;
31 S. Ct. 279; 55 L. Ed. 310
(1911) 15

Pages

Warth v. Seldin,
422 U.S. 490; 95 S. Ct. 2197;
45 L. Ed. 2d 343 (1975) 18,22

Webster v. Reproductive Health
Services, 492 U.S. 490; 109
S. Ct. 3040; 106 L. Ed. 2d 410
(1989) 24

Constitution

U.S. Const, Art. III 18

Statutes

M.C.L. 752.1021;
M.S.A. 28.547(121) 1,3,10

M.C.L. 752.1024;
M.S.A. 28.547(124) 1,11

M.C.L. 752.1027;
M.S.A. 28.547(127) 1,10

M.C.L. 752.1027(5);
M.S.A. 28.547(127)(5) 11

STATUTE INVOLVED IN THE CASE

The Michigan Criminal Assistance to Suicide Act provided, in pertinent part:

M.C.L. 752.1021; M.S.A. 28.547(121):

> Sec. 1.(1) The legislature finds that the voluntary self-termination of human life, with or without assistance, raises serious ethical and public health questions in the state. To study this problem and to develop recommendations for legislation, the Michigan commission on death and dying is created.
>
> (2) This section shall take effect February 25, 1993.

M.C.L. 752.1024; M.S.A. 28.547(124):

> Sec. 4.(1) Within 15 months after the effective date of this act, the commission shall develop and submit to the legislature recommendations as to legislation concerning the voluntary self-termination of life. . . .
>
> (2) This section shall take effect February 25, 1993.

M.C.L. 752.1027; M.S.A. 28.547(127):

> Sec. 7.(1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal

assistance to suicide, a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both:

(a) Provides the physical means by which the other person attempts or commits suicide.

(b) Participates in a physical act by which the other person attempts or commits suicide.

(2) Subsection (1) shall not apply to withholding or withdrawing medical treatment.

(3) Subsection (1) does not apply to prescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.

(4) This section shall take effect February 25, 1993.

(5) This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4.

STATEMENT OF THE CASE

Petitioners seek review on writ of certiorari of the decision by the Michigan Supreme Court finding that the temporary and now-expired Michigan assisted suicide statute (the "assisted suicide statute"), M.C.L. 752.1021 et. seq.; M.S.A. 28.547(121) et. seq., does not violate the United States Constitution.

Petitioners include two individuals alleged to be suffering from terminal cancer and two health care professionals. The two cancer patients, Hobbins and Shapiro, allege that they may wish to have assistance in committing suicide at some point in the progression of their diseases. First Amended Complaint, ¶¶ 2 and 4. Petitioner Drake, a pharmacist,

alleges that he is asked by physicians to fill prescriptions for large quantities of pain-relieving medications for terminally-ill patients which medications he knows that, if taken in sufficient doses, could cause death. First Amended Complaint, ¶ 6. Petitioner Luby, a psychiatrist, alleges that he prescribes anti-depressant medications to treat chronically depressed patients who have expressed suicidal thoughts and ideations. First Amended Complaint, ¶ 7.

Shortly after the assisted suicide statute went into effect, the above Petitioners, along with several other plaintiffs, brought an action for declaratory and injunctive relief against the Attorney General of Michigan in the

Circuit Court for the County of Wayne, Michigan, alleging that the act was unconstitutional. The parties moved for summary judgment and plaintiffs sought a preliminary injunction against enforcement of the statute. The circuit court found that the statute violated the Michigan Constitutional provision regarding inclusion of multiple objects within a single statute and, in addition, found a due process right to commit suicide. The circuit court, however, declined to issue a preliminary injunction, concluding that a hearing would be needed to determine whether the assisted suicide statute placed an undue burden on that right. App. to Pet. 141a.

On appeal by the Attorney General, this action was consolidated with two

other cases challenging the constitutionality of the assisted suicide statute.[1] On May 10, 1994, the Michigan Court of Appeals issued decisions in the above cases finding that the assisted suicide statute was enacted in violation of the state constitution but that it did not otherwise violate the United States Constitution by making it a criminal offense to assist another in committing suicide. Hobbins v. Attorney General, 205 Mich. App. 194; 518 N.W.2d 487 (1994); App. to Pet. 108a. The Court of Appeals simultaneously released an opinion in another matter dealing with the

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1 Both these latter cases involved criminal charges dismissed prior to trial. People v. Kevorkian (Michigan Court of Appeals Docket No. 171056) and People v. Kevorkian (Michigan Court of Appeals Docket No. 172399).

propriety of murder charges based on an assisted suicide occurring prior to the effective date of the assisted suicide statute.[2]

All parties in the above cases appealed to the Michigan Supreme Court, which consolidated all cases for purposes of argument and decision. By opinion released December 13, 1994, the Michigan Supreme Court held that: (1) the assisted suicide statute had been validly enacted as a matter of state law, (2) the United States Constitution does not pro-

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2

People v. Kevorkian No. 1, 205 Mich. App. 180; 517 N.W.2d 293 (1994), concluded that the circuit court erred in quashing murder charges where the defendant supplied two individuals with devices for self-administration of anesthesia and carbon monoxide respectively, and then helped them use the devices to cause their deaths.

hibit a state from imposing criminal penalties on one who assists another in committing suicide, (3) involvement in the events leading up to the death of a suicide, such as intentionally providing the means, is not chargeable as murder unless there is probable cause to believe that death was the direct and natural result of the defendant's act, but may be prosecuted as a common law felony of assisting in a suicide, and (4) the motion to quash murder charges must be reconsidered by the circuit court to determine whether the evidence produced at the preliminary examination was sufficient to bind the defendant over for trial.[3] People v. Kervorkian and Hobbins

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[3] Holdings 3 and 4 pertained to Kevorkian No. 1, discussed above in footnote 2.

v. Attorney General, 447 Mich. 436; ___ N.W.2d ___ (1994); App. to Pet. 1a.

Petitioners now seek a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Temporary Statute Prohibiting Physical Assistance To Suicide Has Expired, Thereby Mooting The Present Case.

The Michigan assisted suicide statute instituted a temporary criminal prohibition on certain activities in assistance of suicide. M.C.L. 752.1027; M.S.A. 28.547(127). The statute also established an advisory commission to study end of life issues and to submit to the legislature a report with recommendations as to legislation concerning the voluntary self-termination of life. M.C.L. 752.1021; M.S.A. 28.547(121). The commission was given 15 months from the effective date of the statute to issue its report and recommendations. M.C.L.

752.1024; M.S.A. 28.547(124). The criminal provisions were set to expire 6 months later. M.C.L. 752.1027(5); M.S.A. 28.547(127)(5).

The assistance to suicide statute went into effect on February 25, 1993. The commission released its report on or about June 8, 1994. The criminal provisions of the statute, therefore, have expired.[4]

In this action, Petitioners sought prospective declaratory and injunctive

---

[4] It is arguable that these provisions expired six months after May 25, 1994, the date established by the statute for submission of the report, since a delay in submission of the report could not extend the criminal provisions without constituting the exercise of an unconstitutional delegation of legislative authority.

relief solely "against the enforcement of Section 7 of 1992 P.A. 270, House Bill No. 4501, M.C.L. 752.1021 et. seq., amended by 1993 Senate Bill 211, which prohibits 'criminal assistance to suicide.'" First Amended Complaint, ¶ 1. The singular basis for Petitioners' due process claim was the alleged statutory prohibition of "any assistance by a physician, licensed health care professional, family member, or friend to a terminally ill person who wishes to hasten the inevitable termination of his or her life in order to avoid extreme and unbearable pain and suffering." First Amended Complaint, ¶ 28.

The long-standing rule followed by this Court is that a case must be dismissed as moot "if an event occurs

[pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." Church of Scientology of California v. United States, 506 U.S. ___; 113 S. Ct. 447; 121 L. Ed. 2d 313, 319 (1992), quoting Mills v. Green, 159 U.S. 651, 653; 16 S. Ct. 132; 40 L. Ed. 293 (1895). This principle is fully applicable to the instant case. Petitioners here sought only prospective relief regarding a specific statutory provision. The challenged statute no longer exists. In these circumstances, an order declaring its unconstitutionality and enjoining its enforcement would be meaningless. Petitioner's case is moot. See, e.g., Burke v. Barnes, 479 U.S. 361, 363-365; 107 S. Ct. 734; 93 L. Ed. 2d 732 (1987) (statute expired by its own terms; therefore case is moot).

This is not a case where a savings clause permits continued enforcement proceedings under an expired or repealed statute, or where prior application of the law may entitle a party to damages. See Koch Refining Co. v. U.S. Dept. of Energy, 658 F.2d 799, 805 (Temp Emer. Ct. App., 1981); Richmond v. J.A. Croson Co., 488 U.S. 469, 478, n. 1; 109 S. Ct. 706; 102 L. Ed. 2d 854 (1989) (expiration of set-aside law did not moot case where parties had continuing controversy over question whether prior application of ordinance entitled plaintiff to damages). It is also not a case where a substantially similar replacement statute has been enacted which proscribes the same conduct. See, Northeastern Florida Contractors v. Jacksonville, 502 U.S. ___; 113 S. Ct. 2297; 124 L. Ed. 2d 586 (1993).

The expiration of a temporary criminal provision does not present a matter capable of repetition, yet evading review under the doctrine first announced by this Court in Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515; 31 S. Ct. 279; 55 L. Ed. 310 (1911). The Michigan Legislature may or may not enact some form of criminal prohibition against assistance to suicide at some time in the future. However, even if the legislature passes a new law to govern this area, there is no assurance that a new statute would proscribe the conduct alleged as protected by plaintiffs in this action. Kremens v. Bartley, 431 U.S. 119, 128-130; 97 S. Ct. 1709; 52 L. Ed. 2d 184 (1977) (challenge to law permitting parents to commit juveniles under 18 to mental hospital mooted, with respect to

those over 13, by new legislation permitting such commitment only of juveniles 13 and under); Board of Public Utility Comm'rs v. Compania General De Tabacos De Filipinas, 249 U.S. 425, 426; 39 S. Ct. 332; 63 L. Ed. 687 (1919) (challenge to statute alleged to constitute unlawful delegation of legislative power to regulatory board dismissed after statutory amendment detailed board's responsibilities); Berry v. Davis, 242 U.S. 468, 470; 37 S. Ct. 208; 61 L. Ed. 441 (1917) (suit to enjoin mandatory vasectomy on plaintiff dismissed after statute requiring operation was replaced by law inapplicable to plaintiff). It is at least within the realm of possibility that a new statute could exempt the conduct alleged by Petitioner in this action from penalty.

Thus, the controversy with respect to the expired criminal provisions of the Michigan assisted suicide statute is moot. A declaration of its invalidity or an injunction against the law's future enforcement would not benefit the Petitioners. It is sheer speculation to anticipate passage of legislative in the future that might impact the interest asserted by Petitioners. Denial of certiorari in these circumstances is necessary to avoid the possibility that this Court will render an advisory decision.

2. Petitioners Lack Standing.

Petitioners assert that they have "continuing standing" to assert their federal constitutional claim because the Michigan Supreme Court has now recognized a common law crime of "assisting suicide"

which would apparently not require active participation in an overt act directly causing death. App. to Pet. 56a-59a. Petitioners, however, also state that the present case does not "challenge the Michigan law as it prohibits 'assistance to suicide' in the ordinary sense of the term." Pet. p. 7, n. 8. At this point, there are no cases interpreting and applying the newly discovered Michigan common law of assisting suicide in a specific factual context.

A threshold question in every federal case is whether a plaintiff has sufficiently alleged a "case or controversy" within Article III of the United States Constitution. Warth v. Seldin, 422 U.S. 490; 95 S. Ct. 2197; 45 L. Ed. 2d 343 (1975). A plaintiff invoking the juris-

diction of this Court must establish, at an irreducible constitutional minimum that: (1) they have suffered an "injury in fact" or an invasion of a legally-protected interest which is concrete and particularized and "actual or imminent," (2) there is a causal connection between the injury and the challenged conduct, and (3) it must be likely that the injury will be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555; 112 S. Ct. 2130, 2136; 119 L. Ed. 2d 351 (1992). Though this Court has recognized that "imminence" is an elastic concept, it is one which must be limited so that an alleged injury is not too speculative. Id., 112 S. Ct. 2130, 2138-2139 at n. 2 (alleged injury to occur at some indefinite future time is not sufficient). The

injury must proceed with a "high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." Id.

In this case, it remains only a hypothetical possibility that the patient Petitioners or the physician Petitioners[5] might engage in conduct that might lead to a prosecution of someone under the newly declared Michigan common law of assisting suicide. This possibility lacks the high degree of immediacy necessary for invocation of federal jurisdiction.

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5 It should be noted that Petitioners Luby and Drake were granted standing by the Circuit Court only with regard to their vagueness challenge to the statute. App. to Pet. 153a-155a.

3. The Present Case Is Not Ripe For Review.

Even assuming arguendo that Petitioners possess sufficient standing to present a federal challenge to the Michigan common law of assisting suicide, the controversy is not ripe for review by this Court.

Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. Federal courts presumptively lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" Bender v. Williamsport Area School Dist., 475 U.S. 534, 546; 106 S. Ct. 1326; 89 L. Ed. 2d 501 (1986), quoting King Bridge Co. v. Otoe County, 120 U.S. 225, 226;

7 S. Ct. 552; 30 L. Ed. 623 (1887). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Bender, supra, at 546, n. 8, quoting Warth v. Seldin, supra, 422 U.S. at 517-518.

Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 136-148; 95 S. Ct. 335; 42 L. Ed. 2d 320 (1974). Petitioners have failed to demonstrate a live dispute involving the actual or threatened application of the Michigan common law of

assisting suicide. The Petition notes that "[a]lthough laws against 'assisted suicide' have long been in effect in many states, these laws have rarely been enforced," and that the original purpose of such laws was to prevent assisting suicide in "the ordinary sense of the term," the application of which is not challenged by Petitioners in this action. Pet. p. 7.

Here, there is no factual record of an actual or imminent application of the Michigan common law sufficient to present the constitutional issue in "clean-cut and concrete form." Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 584; 67 S. Ct. 1409; 91 L. Ed. 1666 (1947). The record also contains no evidence of a credible threat that the

Michigan common law of assisting suicide will be enforced in the types of cases hypothesized by Petitioners.

In this case, postponement of consideration of the questions presented until a more concrete controversy arises has the advantage of permitting Michigan courts a further opportunity to construe the common law prohibition against assisting suicide. The process of subsequent construction may well "materially alter the question to be decided." Babbitt v. Farm Workers, 442 U.S. 289, 306; 99 S. Ct. 2301; 60 L. Ed. 2d 895 (1979); see also Webster v. Reproductive Health Services, 492 U.S. 490, 506; 109 S. Ct. 3040; 106 L. Ed. 2d 410 (1989) (plurality opinion). Otherwise this Court will have to assume that the

Michigan common law reaches the types of cases hypothetically posited by the Petitioners. "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." Longshoremen v. Boyd, 347 U.S. 222, 224; 74 S. Ct. 447; 98 L. Ed. 650 (1954).

Petitioners here seek to present a non-First Amendment facial challenge to newly declared state common law in an action that originally challenged only a temporary statutory enactment. There is no currently pending or imminently threatened enforcement action. Petitioners' claim, therefore, is not ripe for review by this Court.

4. The Michigan Supreme Court Correctly Applied Long-Standing Fourteenth Amendment Jurisprudence In Finding That The Constitution Does Not Protect A Right To Have Assistance In Committing Suicide.

Petitioners invite this Court to consider recognition of a constitutional right to a species of "non-ordinary" assisted suicide. In stark terms, Petitioners seek a declaration that competent, terminally ill persons have a right to obtain a lethal dose of prescription medicine from their doctors for the purpose of killing themselves.

Petitioners attempt to ground this new constitutional right on notions of substantive due process. It is argued that having assistance in ending one's own life is a fundamental liberty

interest arising from concepts of personal autonomy, bodily integrity and informed consent as recognized in Planned Parenthood v. Casey, 505 U.S. ___; 112 S. Ct. 2791; 120 L. Ed. 2d 674 (1992) and Cruzan v. Director, Missouri Dep't. of Health, 497 U.S. 261; 110 S. Ct. 2841; 111 L. Ed. 2d 224 (1990).

This Court has been properly circumspect in utilizing substantive due process to "discover" and thereby constitutionalize new fundamental rights "because guideposts for responsible decision-making in this uncharted area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115; 112 S. Ct. 1061, 1068; 117 L. Ed. 2d 261 (1992).

Where, as here, an asserted liberty interest lacks a basis in the text of the

Constitution or the Bill of Rights, it must be found that such right is either implicit in the concept of ordered liberty or deeply rooted in this Nation's history or traditions. Bowers v. Hardwick, 478 U.S. 186, 191; 106 S. Ct. 2841; 92 L. Ed. 2d 140 (1986). The history and tradition of this nation lend no support to recognition of a right to assisted suicide, and Petitioners present no argument to the contrary. As recently noted by the majority in Compassion in Dying v. Washington, ___ F.3d ___ (No. 94-35534, March 9, 1995), 1995 U.S. App. LEXIS 4589 at 14:

> In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction.

The suggestion that the rationales of Cruzan and Casey ordain discovery of the right asserted in this case represents a basic misunderstanding of those decisions. The limited right to refuse unwanted medical treatment recognized in Cruzan rested on long-standing tort concepts. Cruzan did not question the paramount interest of the State in the protection and preservation of human life as evidenced by the laws of a majority of the States that criminalized assisting suicide. There is a basic difference, which Petitioners refuse to acknowledge, between allowance of a passive natural death as a consequence of refusing treatment and active intervention by a physician to cause the death of a patient though administration of lethal drugs.

Casey concerned reproductive rights in the context of a reconsideration of Roe v. Wade, 410 U.S. 113, 157-159; 93 S. Ct. 705; 35 L. Ed. 2d 147 (1973). In reaffirming Roe, Justice O'Conner, writing for a plurality, recognized the "unique" circumstances of a pre-viability abortion. 112 S. Ct. 2807. In contrast, assistance to suicide involves the destruction of a human life in being. It is not a "natural sequel" to reproductive automony. See 112 S. Ct. 2838 (Stevens, J., concurring in part, dissenting in part) (describing Roe as the natural sequel to earlier contraception cases). The right asserted here is not part of the "rational continuum" represented by the contraception/reproductive rights cases.

Despite the absence of support in history or case law, Petitioners contend that the time is ripe for this Court to authoritatively decide the matter as an issue of first impression. There is no doubt that the concept of physician assisted suicide presents a complex societal question fraught with ethical and policy considerations. The two recent reports of state task forces[6] that comprehensively studied the matter plainly recognized that any legalization of a right to assisted suicide would represent a dramatic change in public policy with attendant significant risks to vulnerable segments of society. This Court should hesitate to rush to judgment.

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6 The Michigan and New York study commission reports are referenced and discussed in Compassion in Dying, supra, 1995 U.S. App. LEXIS 4589, at 15-19.

When confronted with frontier legal problems, this Court has recognized that periods of "percolation" in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court. Arizona v. Evans, ___ U.S. ___ (No. 93-1660, March 1, 1995), Justice Ginsburg, dissenting (citing McCray v. New York, 461 U.S. 961, 963 (1983), Stevens, J, respecting denial of petitions for writs of certiorari, ". . . it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court").

The decision of the Michigan Supreme Court in this case comports with the his-

toric traditions of this Nation and is consistent with the Fourteenth Amendment jurisprudence of this Court. There is no compelling reason for review or disturbance of that decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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6:Hobb-B/B7